**IN THE UPPER TRIBUNAL** **Upper Tribunal case No.** HS/2370/2017
**ADMINISTRATIVE APPEALS CHAMBER**

**Appellants:** Mr & Mrs M (parents of L)
**Respondent**: West Sussex County Council

**Before:** Mr E. Mitchell, Judge of the Upper Tribunal.

**Decision:**

The decision of the First-tier Tribunal (25 July 2017, First-tier Tribunal file reference *EH/938/17/00001*) involved the making of errors on a point of law. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-tier Tribunal's decision and remits to that tribunal for re-determination the appeal made by Mr & Mrs M against the contents of the EHC Plan prepared for the daughter, L, by West Sussex County Council. Directions in connection with that appeal's re-determination are given at the end of the reasons for this decision.

**Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 it is ordered that no person may disclose or publish any matter likely to lead to a member of the public identifying L, the child whose EHC Plan was in issue in these proceedings. This order does not apply to:**

**(a) any person to whom either of L's parents, in the due exercise of their parental responsibility, discloses such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility;**

**(b) any person exercising statutory (including judicial) functions in relation to L where knowledge of a matter is reasonably necessary for the proper exercise of the functions.**

**REASONS FOR DECISION**

**Summary**

1. That it is desirable for the First-tier Tribunal to consider a child's views, wishes and feelings must be close to a universally accepted truth. Therefore, the absence of an express statutory requirement to do so is surprising. This decision holds that, despite the absence of an express requirement, the tribunal is required to consider a child's view's, wishes and feelings.

It also discusses, but I am afraid does not resolve, the difficult question whether, in addressing a parental case that is aligned with a child's views, wishes and feeling, a tribunal will inevitably discharge its obligation to take into account a child's views, wishes and feelings.

2. This decision also considers whether home-schooling or, more accurately, education otherwise than in a school, may be specified in Part I (placement) of an EHC Plan. This decision agrees with existing case law that 'education otherwise than in a school' may not be specified in Part I of an EHC Plan. While the predecessor legislation about statements of SEN, contained in Part IV of the Education Act 1996, expressly provided for a placement of 'education otherwise than in a school', the Children and Families Act 2014 ("2014 Act") does not. However, the 2014 Act regime is not blind to the possibility that a child with an EHC Plan might not always be appropriately educated in a school. This decision addresses the potential for Part F of an EHC plan, which sets out required special educational provision, to reflect that, in an appropriate case, provision for education otherwise than in a school might be made.

**Background**

*L's school history*

3. L, the child of the appellant parents, is considered to have a complex cognitive profile with an assessed average general ability but 'borderline' auditory working memory and processing speed. Professionals have also identified a sensory processing disorder, mild to moderate attention deficit disorder, an auditory processing disorder, difficulties with social communication and low self-esteem. However, those learning difficulties rather lay in the background in these proceedings. The foreground was occupied by L's documented, and very sad, recent history in which she was placed at risk of, and subjected to actual, sexual exploitation.

4. In 2011, when L was aged seven, she was placed on her mainstream primary school's SEN Register. In 2012, she began to receive School Action Plus support. In September 2014, L transferred to P Academy, a mainstream primary school. In that year, the local authority assessed L's educational needs (under the Education Act 1996) but decided that a statement of SEN was not necessary. In September 2015, L transferred to a mainstream secondary school, C High School for Girls.

5. An Occupational Therapy (OT) report dated 1 September 2015, commissioned by L's parents, recommended placement in a "structured school environment where a multi-

disciplinary team is available". At this point, there were no known sexual-related safeguarding concerns. An updated report of 29 March 2017, after such concerns had come to light, recommended a "specialist school setting where occupational therapists work throughout the curriculum".

6. A Speech and Language Therapy (SLT) report, dated 26 November 2015, commissioned by L's parents, made a number of detailed recommendations for SLT services. A report of the NHS SLT service, dated 27 November 2015, concluded that L did not "require a programme of speech and language support outside the classroom". An updated SLT report, commissioned by L's parents, dated 7 March 2017, stated that L "continues to be very vulnerable to bullying and exploitation".

7. The report of an educational psychologist, dated 28 January 2016, was commissioned by L's parents. The psychologist knew that, since transferring to C High School, L had taken naked photographs of herself and carried out internet searches about sexual activities. The psychologist's view was that "she is at risk of sexual exploitation and needs to be in a small caring and nurturing specialist school". A further report in April 2017, at which point further details of L sexual vulnerability were known, recommended the same placement but added: "until such time as an appropriate specialist school placement as indicated above can be obtained…she should continue to be home educated with specialist teachers and support provided for her for at least 2 hours per day".

8. L began to be home-schooled in March 2016. Around that time, the local authority started to prepare an EHC Plan for L under the legislation that replaced statements of SEN (Children & Families Act 2014).

*Preparation of L's EHC Plan*

9. A social care report, produced as part of the EHC Plan process, dated 25 July 2016, stated that L had: taken naked photos of herself and sent them to unknown males; received explicit images in return; "sent" a graphic sexual fantasy involving male teachers to a friend; touched girls' legs and taken photos of them in changing rooms. The report said L's parents removed her from C High School to educate her at home due to their concerns about what she may do next to put herself and others and risk. They were also dissatisfied with the educational provision made for her at C High School. L's sexualised behaviour was reported to have ceased after she left C High School. The author of the social care report went on:

> "It appears peer pressure, sexual desire while around a number of peers and confusion around sexual boundaries were factors in [L's] extreme sexualised behaviours. I am of the view that if [L's] learning needs can be met at home then a longer period of home schooling should be considered. This will enable [L] to have further work with Barnardo's and reduce her risk of CSE [child sexual exploitation] and sexual abuse

> further…Once L is ready to be integrated back into school I would suggest this is again done slowly and carefully with a lot of support".

10. An email written by a worker at Barnardo's Child Sexual Exploitation Service described L's views about home-schooling, which she preferred to education in a school setting, as well as her worries about returning to school. These views are set out in more detail below in these reasons.

11. On 28 September 2016, the local authority issued L's EHC Plan. Within the Plan:

- Background section: referred to a child protection conference on 23 February 2016 which agreed a child protection plan was necessary; reported that L told a social worker she felt happier being educated at home;
- Section B (Special Educational Needs): referred to the most recent educational psychology assessment in January 2016; a full cognitive assessment in April 2016; observations by NHS OTs in October 2015; a history of bullying and difficulty making friends. Section B did not expressly mention sexual vulnerability;
- Section F (special educational provision): included "access to appropriate support…to enhance her understanding of stranger danger and how to keep herself safe"; and access to "appropriately differentiated support to enhance her understanding of danger / how to keep safe when using technology such as the internet or social media sites". A series of linked outcomes were described;
- Section F also recorded the view of the NHS SLT service that L did not need a specific programme of speech and language support in school. However, the Plan did specify SLT training for school staff to "provide an appropriate language and communication environment". The communication provision also referred to social interaction difficulties to be addressed through social skills groups in school and provided for L to have access to a trusted named adult to whom she could pass on concerns;
- Section I (educational placement) specified a type of placement, rather than an actual school, namely "secondary mainstream provision".

12. On 3 May 2017, L's Child Protection Plan was discontinued. The decision was made at a Child Protection Review Conference.

13. The material before the Conference included a social work report whose contents described L's recent progress:

> "[Mother] has done extensive work with [L] about keeping safe. This includes keeping safe on the internet and day to day. [Mother] states that all three children are well aware now of the PANTS rule [guidance for parents on helping their children to stay

> safe from abuse] and of their own accord remind one another of it when one isn't appropriately dressed. Since [L] has left school to be home-schooled [mother] reports that she has not seen any sexualised behaviour from [L]. [L] now has Facebook and this is closely monitored by [mother]. Barnardo's have also supported [L] and [mother] in managing Facebook and the security settings.
>
> A referral to Barnardo's was made and [L] was regarded as at high risk of CSE [child sexual exploitation] and was classed as a priority to be allocated a worker. She has since been allocated to [AS] who is seeing her weekly for an hour and a half each time. [AS] has been building a rapport with [L] before addressing her sexualised behaviours and doing keep safe work with her. This work has now been completed.
>
> [L] continues to access her home education and various groups. There have been no concerns raised by other professionals".

14. The report of the Review Conference Chair stated:

> "It was the unanimous view of the conference endorsed by the Chair that [L] was not currently at risk of significant harm.
>
> The original concerns were around [L] placing herself at risk of harm, potentially Child Sexual Exploitation, according to experts in the field. Professionals are satisfied with the parents' ability to safeguard [L].
>
> Work has been completed with the family and [L] relating to addressing associated risk and the Barnardo's professional [AS] who attended conference advised that the risk has reduced from potentially high risk at the beginning of the intervention to a current status of low risk.
>
> In light of this [L] no longer needs to be subject of a child protection plan.
>
> It is recognised that Home Education continues and the parents have worries should [L] return to mainstream .
>
> Should any further concerns arise regarding [L] again showing indicators which suggest she is at risk of harm children's services should consider further intervention and support."

*Appeal to the First-tier Tribunal*

15. On 19 December 2016, L's parents appealed to the First-tier Tribunal against the contents of her EHC Plan. The notice of appeal was drafted by their solicitor and challenged the Plan's description of L's special educational needs (SEN), the provision to meet her SEN and the type of school named in the Plan. In summary, the grounds of appeal were:

- The Plan's description of SEN was based on out-of-date (2015) reports. Up-to-date assessments might be required (by an educational psychologist, OT and SLT;
- The description of SEN failed to mention either L's sexual vulnerability or her child protection plan;
- The Plan's description of provision to meet SEN was unacceptably vague. Use of phrases such as "access to" and "opportunities for" did not provide a clear guarantee that the support would be provided;
- The Plan failed to specify provision for home tutoring in English, Maths and Science;
- No school would be able satisfactorily to meet L needs. The only provision that would do was full-time education "in her home environment". Mainstream schooling would result in L displaying inappropriate sexualised behaviour which would place her at risk. Section I of the Plan should be amended to specify L's placement as 'Education Otherwise than at School';
- L's mother had considered mainstream and specialist schools but concluded none could currently meet her needs. L had made good progress while being home-schooled and, for the time being, that should be reflected in her EHC Plan although it was accepted that the longer term aim was attendance at a school, albeit a specialist school.

16. The local authority's written grounds of opposition to the appeal were, in substance, a detailed account of the background to L's case. They did not directly address the arguments in the parents' notice of appeal but did state that the authority hoped to seek L's views, intended to submit further professional evidence and would continue to try and agreed an EHC Plan 'working document' with L's parents

**The First-tier Tribunal's decision**

17. L's parents represented themselves at the hearing before the First-tier Tribunal. They produced as witnesses their educational psychologist and speech and language therapist. The local authority was represented by a solicitor and produced witnesses from the same disciplines as the parents'.

18. The tribunal admitted late evidence from both parties. Unfortunately, all the late evidence was absent from the appeal bundle supplied to the Upper Tribunal by the First-tier Tribunal. On request, the late evidence was subsequently supplied and copied to the parties.

19. The First-tier Tribunal dismissed the appeal. Its statement of reasons included the following passages:

- L's parents "did not contend that [L] could not be educated…in a small special school". As a result, they could not rely on section 61 of the Children & Families Act 2014 and it was not open to the Tribunal to order the local authority to amend the EHC Plan "unless we concluded it would be inappropriate for [L] to be educated in a mainstream secondary school";
- The local authority's witnesses both gave evidence that [L's] needs could be met in a mainstream secondary school. They disagreed with L's parents that small class sizes were necessary;
- The late evidence included a 3 May 2017 report of a child protection conference which stated that [L] was no longer at risk of significant harm;
- The Tribunal rejected L's parents' evidence that the chair of the conference informed them that L would be regarded as at risk if educated in a mainstream school. This was not recorded in the report and it was unlikely that "the mere fact that [L] was in a mainstream school would mean that she was in need of a child protection plan";
- The Tribunal was satisfied that L "could realistically be educated in a mainstream school". I note that this was not an accurate description of the statutory test but the tribunal may well have meant 'in a school', which is the correct test rather than 'in a mainstream school', since that is how it described the test in other parts of its reasons.

**Arguments before the Upper Tribunal**

*Grounds of appeal*

20. The parents were refused permission to appeal to the Upper Tribunal by the First-tier Tribunal and, on paper, by an Upper Tribunal Judge. They requested reconsideration of their application for permission at a hearing. Following a hearing, I granted permission to appeal on the following grounds, which I considered had a realistic prospect of success:

*Ground 1 – whether the First-tier Tribunal erred in law by failing to take into account L's views*

21. Arguably the tribunal erred in law by failing to take into account L's views (see *S v Worcestershire County Council* [2017] UKUT 92 (AAC)). The EHC Plan, under the heading 'views, interests and aspirations', contained a section headed 'What is important to [L] now'. This reflected some of L's views but not her views on an apparently central issue namely

education at a school. As the parents pointed out, a letter written by a worker at Barnardo's Child Sexual Exploitation Service recorded L's view that she felt happy and safe being home-schooled, was worried about being bullied and taken advantage of at school and wanted to be home-schooled for longer.

*Ground 2 – whether the First-tier Tribunal's approach to home-schooling involved an error on a point of law*

22. Arguably, the tribunal misdirected itself in law in relation to section 61 of the Children & Families Act 2014. The Tribunal appeared to hold that L's parents were precluded from arguing that section 61 applied once they had conceded that L could be educated at a school. The parents deny ever having made such a concession but, even if they did, arguably it did not necessarily follow that (a) the parents had to be treated as having abandoned their pursuit of home-schooling; and (b) the parents could not hope to persuade the Tribunal that educational provision in school would be inappropriate.

23. Arguably, the fact that, in theory, L could be educated in a school did not necessarily lead to the conclusion that all, some or one of the potential schools that [L] might realistically attend would offer an education such that a determination that education in school was inappropriate. Arguably, section 61 should not be applied by reference to a notional school but by reference to the schools that a child might realistically attend.

24. Arguably, the tribunal should have inquired into exactly what L's parents meant by 'L could attend a school'. In the light of their previously determined pursuit of home-schooling, the permission determination posed the question whether it was fair to interpret this as a concession that school attendance would deliver an appropriate standard of education. The word 'could' is arguably capable of bearing different shades of meaning. Was it fair to interpret it to mean 'would receive an appropriate education' without probing the matter further?

25. However, the permission determination also posed the question whether any error of law was material. The Upper Tribunal's decision in *TW* (see below) arguably prevented the First-tier Tribunal specifying 'education otherwise than in a school' as L's educational placement.

*Ground 3 – whether the First-tier Tribunal's treatment of L's history of sexual and social vulnerability / exploitation involved an error on a point of law*

26. Arguably, the tribunal failed to make adequate findings of fact and/or failed to take into account relevant evidence suggestive of social and sexual vulnerability and its implications for L's education.

27. The views of the parents' OT about L's 'social, emotional and mental health' seem to have been rejected because she was considered to have expressed views on a matter falling outside her professional expertise. Whether or not that was a correct approach, the social work

report must surely have been written by a social worker, a profession whose expertise clearly does extend to evaluating risks to a child's welfare and general well-being. This report was not referred to in the tribunal's statement of reasons yet it recommended considering a further period of home-schooling and, when L's risk of sexual exploitation had reduced, a slow and careful re-integration into school. Arguably, the failure to deal with the social work report was an error on a point of law.

28. Paragraph 7 of the tribunal's statement of reasons suggests the evidence referred to in that paragraph was accepted (the tribunal did not expressly reject it). However, the tribunal's evaluation of the evidence arguably failed to take into account the social care report's description of 'extreme sexualised behaviour'. Similarly, the tribunal's characterisation of L's experiences as 'sexting' arguably failed to take into account evidence about the extent of what had happened to her.

29. The tribunal's statement of reasons, in paragraph 56, might be read as finding that L could not face an unacceptable risk of sexual exploitation at a mainstream school since she no longer had a child protection plan. Arguably, the Tribunal should have asked itself why L no longer had a child protection plan, in particular whether it was linked to her having been home-schooled for a number of months. If the Tribunal thought the plan ended because L had gained the skills necessary to protect herself from exploitation in a mainstream school, arguably inadequate reasons were given since supporting evidence for such a finding was arguably absent. Linked to this, arguably the Tribunal gave inadequate reasons for not addressing L's social and sexual vulnerability at any mainstream school she might attend.

*The local authority's arguments*

30. *Ground 1.* The tribunal did take into account L's views, including those in the Barnardo's worker's email. The tribunal's exploration of transition arrangements, and the evidence before it about support for an "anxious worried student", shows that it addressed how L could be supported on a return to school and, in substance, addressed her views. The fact that a particular piece of evidence was not referred to in the tribunal's statement of reasons does not mean it was overlooked. The statement of reasons shows that the tribunal carefully considered all documentary evidence within the tribunal bundle.

31. The authority dispute that L's views about home education was a "central issue". This was not clearly reflected in the parents' evidence and that of their witnesses, as is shown by paragraphs 52 to 57 of the statement of reasons, which records evidence given about school setting.

32. *Ground 2.* The tribunal correctly held that an EHC Plan could specify in section I "education otherwise than in a school" if it would be inappropriate for provision to be made in a school. No reasons were given for this assertion.

33. While L's mother gave evidence that her main concern was child protection if L attended school, "[her father] countered that it was [her needs]". Somewhat inconsistently, the authority also argues that, at the tribunal hearing, L's parents confirmed their view that mainstream schooling was unsuitable for safeguarding reasons. The father also gave evidence that the Child Protection Review Conference report of 3 May 2017 meant that, were L to be educated in mainstream school, her case would be referred to Children's Social Care. The tribunal noted that the report contained no such recommendation.

34. The First-tier Tribunal made an evidence-based decision that took into account all relevant considerations. In fact, L's parents' educational psychologist "advocated a school setting albeit with small classes despite [L's] reported desire to be home-schooled".

*The parents' reply*

35. *Ground 1.* The parents draw attention to the UN Convention on the Rights of the Child, Article 12(2) of which provides "…the child shall…be provided the opportunity to be heard in any judicial…proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". L's Article 12 rights were ignored. The SLT report relied on by the tribunal recorded that L "hates school". The EHC Plan was not updated to reflect L's views since her time in primary school.

36. *Ground 2.* The parents set out why, in their view, L could not be educated safely in a mainstream school due to her vulnerability.

37. *Ground 3.* The parents continue to maintain that relevant evidence about L's history of sexual exploitation and her sexual vulnerability were ignored.

38. The parents also enquire whether the full First-tier Tribunal bundle has been provided to the Upper Tribunal. While it had not been provided at the date of the permission hearing, I can confirm that it was subsequently supplied.

**Legal framework**

*A child's views, wishes and feelings*

39. Section 19 of the 2014 Act confers a number of what may be termed participative obligations on a local authority, including:

> "In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—
>
> (a) the views, wishes and feelings of the child…;

> (b) the importance of the child…participating as fully as possible in decisions relating to the exercise of the function concerned;
>
> (c) the importance of the child being provided with the information and support necessary to enable participation in those decisions..."

40. *S v Worcestershire CC* (SEN) [2017] UKUT 0092 (AAC) concerned an EHC Plan issued in respect of a young person. As a result, the young person, rather than his parent/s, was a party to the subsequent proceedings before the First-tier Tribunal. The Upper Tribunal rejected the local authority's argument that section 19 did not operate at the appeal stage. The authority argued that section 19 creates "high-level strategic functions that could not have been intended to apply to the Tribunal". The Upper Tribunal rejected this argument because "[the section 19(a) to (c) obligations] are obligations which apply to and are designed for the benefit of specific children and young persons".

41. In *S v Worcestershire*, the Upper Tribunal noted that, as a party, the young person took the benefit of the overriding objective set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("2008 Rules"). The overriding objective is to enable the Tribunal to deal with cases fairly and justly, which includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". As a result, the Upper Tribunal doubted whether section 19 added much in practice at the appeal stage where the subject of an EHC Plan was also a party to tribunal proceedings. In the present case, however, L, being a child, was not a party to the First-tier Tribunal proceedings.

42. In securing an EHC needs assessment, a local authority must take into account the child's views, wishes and feelings (regulation 7 of the SEN and Disability Regulations 2014 ("2014 Regulations")). At the next stage – preparing an EHC Plan – a local authority must take into account the evidence received during the assessment (regulation 11) which should, by virtue of regulation 7, include the child's views, wishes and feelings. The child's views, wishes and feelings are to be recorded in section A of the Plan.

43. Rule 21(2)(e) of the 2008 Rules requires a local authority's appeal response to include "the views of the child about the issues raised by the proceedings". If the child's views were not available when the response was supplied, a practice direction requires them to be supplied before the final hearing (paragraph 15(c) of the Practice Direction about SEN and disability discrimination in schools cases in the First-tier Tribunal, given by the Senior

President of Tribunals on 30 October 2008). While the Rules do not expressly require the child's views to be taken into account, one might ask what is the point of the above requirements if the tribunal is not expected to take the views into account.

44. The right of appeal to the First-tier Tribunal, conferred by section 51 of the 2014 Act, does not extend to a local authority's description, in section A of an EHC Plan, of a child's views, wishes and feelings.

*'Education otherwise than in a school'*

45. In preparing an EHC Plan, a local authority must secure that the plan provides for mainstream education unless that is incompatible with the child's or parental wishes (section 33(2)(a) of the 2014 Act), or the provision of efficient education for others (section 33(2)(b)).

46. The definition of EHC Plan in section 37(2) of the 2014 Act requires a plan to specify certain matters including the child's SEN, outcomes sought and the special educational provision required.

47. During the preparation of a draft EHC plan, parents have the right to request that the plan names a particular school if it is of a type included in the list in section 38(3) of the 2014 Act. Parents have a qualified right to have the requested school named in the plan (section 39(3)). There is no statutory right for parents to request education otherwise than in a school.

48. EHC Plans are required to specify either a particular school or type of school (sections 39 and 40 of the 2014 Act). If a parent does not have a statutory right to have a particular school named, the authority must name the school, or type of school, considered appropriate. Regulation 12(1)(i) of the 2014 Regulations requires the EHC Plan to set out, in section I, the name, or type, of educational institution to be attended by the child (special educational provision is set out in section F).The Act does not disapply this requirement if the most appropriate provision is considered to be 'education otherwise than in a school'. In *East Sussex CC v TW* [2016] UKUT 528 (AAC) Upper Tribunal Judge Jacobs decided that an EHC Plan could not specify in Part I (school, institution or type thereof) a child or young person's home:

> "33. The tribunal tried to avoid this by adopting an argument put by Mr Friel. He argued that a local authority may approve home tuition under section 61. That may be so, but it does not follow that the home can properly be entered into Section I. It does not fit into the language used by regulation 12(1)(i) [of the SEN & Disability

> Regulations 2014], which deals with just the type of school or institution that must be inappropriate in order for section 61 to apply."

49. At first sight, the review provisions of the 2014 Regulations do not sit entirely comfortably with a prohibition on an EHC Plan naming home-schooling / education otherwise than in a school as a child's educational placement. Regulation 21 deals with reviews where a child with an EHC Plan does not attend a school. Of statutory necessity, the child's Plan will name either an educational institution or type of institution. Section 42 of the 2014 Act requires a local authority to secure the special educational provision specified in an EHC Plan but not if a parent "has made suitable alternative arrangements" (section 42(5)). Regulation 21 may well be predicated on the assumption that a parent has made suitable alternative arrangements which, in principle, ought to extend to parental involvement in arrangements made by a local authority under section 61 of the 2014 Act.

50. The legislation replaced by the 2014 Act in England provided for statements of SEN to specify 'education otherwise than in a school' within a statement of SEN. Section 324(4) of the Education Act 1996 provided:

> "The statement shall—
>
> (a) specify the type of school or other institution which the [local authority] consider would be appropriate for the child,
>
> (b) if they are not required under Schedule 27 to specify the name of any school in the statement, specify the name of any school or institution (whether in the United Kingdom or elsewhere) which they consider would be appropriate for the child and should be specified in the statement, and
>
> (c) specify any provision for the child for which they make arrangements under section 319 and which they consider should be specified in the statement."

51. Section 319 of the 1996 Act conferred power on a local authority to arrange for special educational provision to be made "otherwise than in a school". Section 61(1) of the 2014 Act also confers power on a local authority to "arrange for any special educational provision that it has decided is necessary for a child…for whom it is responsible to be made otherwise than in a school…". The power may only be exercised if the authority is satisfied it would be inappropriate for "the provision" to be made in a school (section 61(2)).

**Conclusions**

*Ground 1 –L's views, wishes and feelings and the tribunal's approach to them*

52. The evidence before the tribunal included:

- L's EHC Plan, dated 28 September 2016 (i.e. some six months after she was withdrawn from school), in the section for recording L's views, stated:
  - Routine was important to her, both at school and at home on weekends;
  - L did not want to be on her own in the playground;
  - "[L] has told the social worker that she feels happier being educated at home. She feels happier now she isn't at school and there have been no more incidents of sexualised behaviour";
  - "she wishes to have friends yet constantly feels rejected. She has a very high level of anxiety and this is making it difficult for her to sleep"
- The local authority's response to the appeal stated "the local authority is hoping to seek [L's] views in relation to the issues raised by this appeal". I do not think this happened;
- The report of the educational psychologist instructed by L's parents dated 25 April 2017, following a home assessment, included:
  - "[L] presented as more relaxed and less anxious. She told me that she preferred being out of school and having her lessons at home. She told me that she had individual tuition for English and Mathematics and feels that she is learning more";
  - "she was adamant that she did not want to go back to a big school like [her former secondary school]";
  - "I explained to [L] that most children do go to school. Then I asked her what sort of school she would find okay. She immediately said, "no bullies, small and quiet". When I asked her if she would like a school with just girls or with boys and girls, she replied boys and girls. When given alternatives, she said that she would like her classes to be small and for the children to be about her age or a little older…she said that she wanted teachers to have lots of time to spend to help her with her work";
  - "In order to recheck [L's] feelings I decided to reuse the Beck Youth Inventories with her…In completing this questionnaire [L] displayed a literal understanding of the questions. She gave answers and often said it was different at [her former secondary school]. Interestingly her responses were less extreme and mostly within the average range indicating that since

being home educated her anxiety and anger have significantly decreased. At times she indicated that it had been very worrying for her at school and that she was bullied"

- Email written by a worker at the Barnardo's Child Sexual Exploitation Service, undated but which must have been written at some point in mid-2017, whose contents included:
    - "[L] has expressed her wish to continue to be home-schooled and during our sessions we have spoken about [L's] reasons for this decision. [L] is primarily worried about being bullied again at school. She is concerned that if children bully her they may ask her to send inappropriate photos or speak to risky people online again. [L] has spoken about feeling intimidated easily and worrying that, although she knows the dangers of speaking to unknown people online, that she may be peer-pressured into doing this";
    - "[L] is aware that it is important to her to be liked and, due to this, she is concerned that she will not be able to say "no" and resist grooming from peers and adults";
    - "[L] has identified school as not feeling like a safe place for her due to the risk of grooming";
    - "[L] has expressed her wish to be home-schooled for more time, so that she can fully recover from this trauma…[L] has told me that she feels happy being home-schooled and most importantly has said that she now feels safe. [L] explained that this is due to her knowing that people are not trying to exploit her or persuade her to do anything risky";
    - "[L] also spoke about finding school work difficult and her anxiety that she will not be able to keep up with the work or understand it properly. [L] told me that this made her feel frustrated and negatively impacts on her self-esteem when she can't understand".

53. The First-tier Tribunal's statement of reasons says almost nothing about L's views, wishes and feelings. I have re-read a number of times paragraphs 52 to 57 of the tribunal's statement of reasons, which the authority argue sets out L's views. It does not. It includes many other views about L's needs and the provision she requires but not her own.

54. The First-tier Tribunal's statement of reasons also states: "we read the bundle of papers before us carefully…we refer in these reasons only to those parts of the evidence that were of particular relevance" (paragraph. 11).

*Ground 1 – why the First-tier Tribunal erred in law*

55. My attention has not been drawn to any legislative provision that expressly requires the First-tier Tribunal to take into account, or have regard to, a child's views (or views, wishes and feelings) about the subject-matter of an appeal. Nevertheless, I am satisfied that such a requirement exists. If the full legislative context is considered, we see that:

(a) Whenever a local authority is exercising functions relation to an EHC Plan, section 19 of the 2014 Act requires the authority to have regard to the "views, wishes and feelings of the child". It would not accord with the statutory purpose if this requirement were to fall away once an appeal is made to the First-tier Tribunal. And, in any event, the Upper Tribunal has already decided that the section 19 (a) to (c) obligations apply on appeal (*S v Worcestershire CC* (SEN) [2017] UKUT 0092 (AAC)). That case involved a young person who, as a party to the appeal, took the benefit of the overriding objective of the tribunal's procedural rules so that the Upper Tribunal doubted whether section 19 would make any practical difference. The present case, however, involves a parent's appeal so that the application of section 19 at the appeal stage might add something in practice;

(b) In securing an EHC needs assessment, a local authority must take into account the child's views, wishes and feelings (regulation 7 of the SEN and Disability Regulations 2014). In preparing an EHC Plan, the local authority must take into account the evidence received during the assessment (regulation 11) which should therefore include the child's views, wishes and feelings. The Plan itself must set out the child's views, wishes and feelings. To leave the child's views, wishes and feelings out of account at the appeal stage would, again, run counter to the wider statutory purpose;

(c) Rule 21(2)(e) of the tribunal's procedural rules requires a local authority appeal response to include "the views of the child about the issues raised by the proceedings". If the child's views were not available when the response was supplied, a practice direction requires them to be supplied before the final hearing. While the Rules contain no express requirement to take into account the child's views, there would seem little point in requiring them to be supplied if a tribunal was not expected to take them into account.

56. As I understand it, the authority argues that, in dealing with L's parents' case, the First-tier Tribunal of necessity took into account, or had regard to, her views, wishes and feelings. I have found this a difficult point.

57. On the one hand, it may be said that the authority's stance reduces the requirement to take into account a child's views, wishes and feelings to a dead letter. In my experience, at any

rate, a child's views tend to be broadly aligned, and rarely inconsistent, with the parental case. If the requirement to take into account a child's views etc is satisfied by simply deciding an appeal, the child's voice may be lost.

58. On the other hand, is it in a child's interests for a tribunal's decision to be set aside where (a) it deals properly with all the relevant issues but the only flaw is that it failed to show that the child's views, wishes and feelings were taken into account; and (b) had the child's views been expressly taken into account, the result would have been exactly the same (on the assumption that the child's views and parental case were aligned)? If the tribunal gave an otherwise sound decision, there must be a real chance that all will be achieved is the same decision on remission to the First-tier Tribunal but only after some months have passed.

59. However, as I explain below, I need not, in this case, decide whether the local authority's argument is correct. I will say though that there is a simple way of avoiding the issue recurring, which is for First-tier Tribunal statements of reasons expressly to deal with a child's views, wishes and feelings. I do not wish to add unnecessarily to the burdens faced by that tribunal but would not expect this to take up too much time. A paragraph or two should normally be sufficient or perhaps even less if there is no mismatch between the child's views etc and the parental case.

60. In this case, the following of L's views were not, in terms, addressed in the First-tier Tribunal's reasoning:

- Her expressed preferences for being out of school and having lessons at home;
- Her desire not to go back to a 'big school' and her preference for a school that was 'small' and 'quiet', with small classes;
- Her desire to be home-schooled until she had recovered from her traumatic experiences and her view that she was happy and felt safe while being home-schooled because she knew no one would try to exploit her and persuade her to do something risky;
- Her worries about being bullied at school, which she said did not feel like a safe place for her, and persuaded to send inappropriate photos to and/or speak to risk people online, despite her awareness of the risks of doing so;
- L's awareness that it is important to be liked and her consequent concern that she will not be able to say 'no' and resist grooming by peers and adults;
- L's anxiety about not being able to keep up with work or understand it properly.

61. One of L's views was that she did not like praise and this was addressed by the First-tier Tribunal. Her plan's special education provision was modified accordingly.

62. The subject matter of some of the above views was addressed in the tribunal's reasons. However, the merits of home-schooling, about which L expressed a clear opinion, was not addressed at all once the tribunal had directed itself that L's parents could not argue for education otherwise than in a school (this aspect of this appeal is dealt with further below in ground 2). In this respect, it cannot be said that L's views were even indirectly addressed. To that extent, I decide that the First-tier Tribunal erred in law by failing to take into account L's views, wishes and feelings. Of course, the tribunal was not required to make a decision in accordance with L's view but, since the merits of 'home-schooling', as compared with school attendance, was not addressed elsewhere in the tribunal's reasons, it was required to acknowledge her views and give an explanation, which could have been reasonably brief, as to why it was making a decision that did not accord with her views.

*Ground 2 – whether the tribunal misdirected itself in law in relation to section 61 of the 2014 Act*

63. I am hampered in determining ground 2 because the local authority failed adequately to address the ground in its appeal response. That I proceed nevertheless to decide this appeal does not mean I condone the local authority's failure. In many cases, I would require a supplementary submission but, being aware of the need to avoid further delay in resolving a dispute about a child's education, I have not done so in this case.

64. Section 61(2) of the 2014 Act prevents a local authority from arranging for any necessary special educational provision to be made otherwise than in a school unless it is satisfied that "it would be inappropriate for the provision to be made in a school…". I have doubts whether the tribunal was correct to proceed directly from a parental concession that L 'could be educated' at a school (in fact, the reasons say the parents "did not contend that [L] could not be educated in a school) to a finding that section 61 was irrelevant. 'Could' may bear a range of meanings. In the present context, its meanings could have included (a) 'should be educated at a school', (b) 'could in theory be educated at a school but with attendant safety risks' or (c) 'could safely be educated at a school at some point in the future'. Meaning (a) would certainly shut out section 61, if the tribunal agreed that L should be educated at a school. Meaning (b) might or might not have shut out section 61, depending on the nature and gravity of any risks. Meaning (c) might have satisfied section 61(2).

65. However, before proceeding further I need to consider whether, in law, it would have been open to the First-tier Tribunal to specify 'education otherwise than in a school' in section I of L's EHC Plan, which the parents say it should have done. I do so even though both parties submit it would have been open to the tribunal to specify 'education otherwise than in a school' in Part I, had it considered the section 61(2) condition met. If the law does not permit this, I would not want the tribunal that re-determines L's parents' appeal to assume it did.

66. I agree with Upper Tribunal Judge Jacobs' decision in *East Sussex CC v TW* [2016] UKUT 528 (AAC). Comparing the 2014 Act with the predecessor legislation in Part IV of the Education Act 1996 shows that Parliament decided no longer to make express provision for education otherwise than in a school in the formal document that specifies a child's educational placement. Neither the 2014 Act, nor the 2014 Regulations, permit anything other than a school or other institution, or type of school or other institution, to be specified in section I of an EHC Plan. The First-tier Tribunal could not therefore have materially erred in law by failing to address whether 'education otherwise than at school' should have been specified in section I of L's EHC Plan.

67. However, that is not the end of the matter. Since section 61 is contained within a Part of the 2014 Act devoted to children and young persons with special educational needs, I cannot accept that Parliament intended that children with an EHC Plan should never have the option of education otherwise than in a school. While all such Plans must specify a school/institution or type of school/institution, it is in my judgment open to a local authority or tribunal, in an appropriate case, also to make section 61 provision within section F of an EHC Plan (the section setting out the required special educational provision) if, of course, it is satisfied that the section 61(2) condition is met. However, some squaring of the statutory circle is needed.

68. Applying domestic law principles of statutory interpretation, the absolute requirement for an EHC Plan to specify either a school or type of school means that any section 61 provision for a child with an EHC Plan needs to be framed either:

(a) with the ultimate aim of making it appropriate for a child to be educated in a school. I say that because one cannot ignore the absolute requirement for an EHC Plan to name either the school selected by a parent in the exercise of statutory rights or, if no such selection is made, the school or type of school which the local authority considers appropriate for the child. As it happens, this approach may match L's recorded views. She reportedly told the educational psychologist that she wanted to return to school but did not yet feel ready to do so; or

(b) as part of an educational package involving elements of attendance at a school and education otherwise than in a school. While I have not heard argument on this point, my view is that section 61 provision and school attendance are not necessarily mutually exclusive. Section 61(1) confers power on a local authority to arrange for "any special educational provision" that is has decided is necessary to be made otherwise than in a school, rather than "the special educational provision".

69. In my judgment, the above interpretation accords is consistent with the review provisions of the 2014 Regulations which, as I have noted, anticipate that some children with an EHC Plan might not be receiving education in a school.

70. For the above reasons, I decide that the First-tier Tribunal erred in law. In the absence of further enquiry into, and explanation of what the parents meant when they reportedly agreed that L "could be educated in a school" (or their not contending she could not), the tribunal gave inadequate reasons for failing to address whether some sort of provision ought to have been made in section F of L's EHC Plan for education otherwise than in a school.

*Ground 3 – the First-tier Tribunal's treatment of L's history of sexual and social vulnerability / exploitation*

71. Since this case is to be remitted to the First-tier Tribunal for re-determination, I shall not deal with ground 3. It will fall to that tribunal to determine whether the evidence about L's vulnerabilities influences the special educational provision she requires and the school, or type of school, to be specified in her EHC Plan.

**Disposal of appeal**

72. The First-tier Tribunal's decision involved errors on points of law. It is set aside and L's parents appeal against the contents of the EHC Plan prepared by West Sussex County Council is remitted to that tribunal for re-determination. I do not myself have the expertise to re-make the First-tier Tribunal's decision. The issues arising in this case need to be determined by the First-tier Tribunal, a judicial body possessing specialist expertise lacked by the Upper Tribunal.

73. I do not direct a re-determination before a differently-constituted panel. In my view, the constitution of the panel is a matter that, in this case, should be determined by a salaried judge of the First-tier Tribunal.

**Directions**

I direct as follows

(1) This case is remitted to the First-tier Tribunal for re-determination of the appeal made by L's parents against the contents of the EHC Plan prepared for L by West Sussex County Council;

(2) As soon as possible, the file is to be placed before a salaried judge of the First-tier Tribunal to consider if case management directions are required;

(3) If L's parents wish to rely on any further written argument or evidence, they must supply it to the First-tier Tribunal as soon as possible. They should note that the new documentary evidence they supplied to the Upper Tribunal about L's views, wishes and feelings has <u>not</u> been added to the First-tier Tribunal's file. If they want this

document to be considered by the First-tier Tribunal, they should supply it to that tribunal. If necessary, Upper Tribunal staff can supply the parents with a copy.

**(Signed on the Original)**

E Mitchell
**Judge of the Upper Tribunal**
**30 September 2018**