Upper Tribunal for Scotland

[2021] UT 1
UTS/AP/20/0023

DECISION NOTICE OF LADY POOLE

on appeal in the case of

Aberdeen City Council, Aberdeen City Council, Marischal College, Broad Street, Aberdeen, AB10 1AB; Broad Street, Aberdeen

Appellant

and

LS, c/o Iain Nisbet, Cairn Legal, 1st Floor Regent House, Glasgow, G2 2RU

Respondent

FTT Case Reference FTS/HEC/AR/20/0057

16 December 2020

Decision

The Upper Tribunal, having considered the submissions of parties, and in terms of Section 47(1) of the Tribunals (Scotland) Act 2014:

UPHOLDS the decision of the First-tier Tribunal for Scotland dated 1 and 7 September 2020 on a preliminary issue.

Reasons for Decision

Introduction

[1] This appeal concerns the question of whether a valid placing request was made to Aberdeen City Council ("**ACC**"). The request was for LS, a 16 year old school pupil, to be

placed in the Royal National College for the Blind in Hereford, England ("**RNC**"). ACC rejected the request because it considered RNC was not a school. The appeal is about the proper construction of legislation governing placing requests for young persons with additional support needs ("**ASN**").

Factual background and procedural history

[2] LS has a brain tumour which presses on her optic nerve, adversely affecting her vision. She has no vision in her right eye, very restricted vision in her left eye and is registered blind. She has problems with speed of information processing and psychomotor skills. She suffers from fatigue. It is not in dispute that LS has ASN. She has a co-ordinated support plan. She is currently an S5 pupil in a school for which ACC is responsible. She receives additional support there.

[3] On 23 January 2020, after assessment, LS was offered a place for a 3 year period at RNC. The place was to begin in September 2020. RNC is an independent college of further education for young people and adults who are visually impaired or blind. It takes people who are aged from 16 up to 25. About 50% of RNC's students are between 16 and 18 years old, and the other 50% are between 18 and 25. RNC provides a dual model curriculum with both academic and vocational pathways, including studying for qualifications such as GCSE, AS and A level. It prepares students for independent living, transition to employment and progression to higher education.

[4] ACC's response to LS's request to be placed at RNC was provided by email dated 8 June 2020. ACC decided that the placing request was incompetent because RNC was a college of further education and not a school. ACC did not in that email provide information which Section 28(2)(c) and (e) of the Education (Additional Support for

Learning) (Scotland) Act 2004 (the "**2004 Act**") requires to be provided if a placing request is refused. The case of *DS* v *Fife Council* 2016 SC 556 found that provision of advice about other options and strategies may be a reasonable adjustment for a disabled pupil. ACC did not provide such advice.

[5] On 25 June 2020, the First-tier Tribunal for Scotland ("**FtT**") received an application on behalf of LS challenging the decision of ACC. On 2 July 2020, following a hearing by telephone conference call, the FtT issued directions stating among other things: "There is a preliminary question over whether the institution specified in the appellant's request is a 'school' for the purposes of the 2004 Act. Until that question is resolved, the reference cannot proceed". Parties were agreed this matter should be determined by a legal member sitting alone. On 28 August 2020 there was a virtual hearing on the preliminary issue at which evidence was led.

[6] On 1 September 2020, the FtT found that RNC satisfied the criteria to qualify as a school under relevant legislation, and LS had made a valid placing request. Reasons for that decision were issued by the legal member on 7 September 2020. ACC applied to review and appeal the decision. A different legal member issued a directions notice dated 27 September ordering a review. On 13 October 2020 there was a decision by the original legal member to take no action on the review. On 4 November 2020, the different legal member issued a decision granting permission to appeal to the Upper Tribunal for Scotland ("**UTS**") on two out of three grounds of appeal advanced. Permission was refused on the third ground.

[7] On 12 November 2020, ACC sought further permission from UTS to appeal the ground upon which permission had been refused by the FtT. On 17 November 2020, the UTS granted permission for the additional ground of appeal. On 19 November 2020, having first invited submissions on proposed orders, the UTS made procedural orders for written

submissions, authorities and any documents. After receipt of submissions, there was an oral hearing on 11 December 2020.

Grounds of appeal

[8] ACC challenges the finding of the FtT that there was a valid placing request. There are three grounds of challenge to the FtT's decision, summarised as follows:

8.1 The FtT failed to consider that the distinction between a school and an institution for further education lies in whether the establishment in question makes any provision for pupils or students of school age, and not the nature of the qualifications to which the curriculum is directed

8.2 The FtT erred in dismissing the statutory definition of "school" provided in section 29(2) of the 2004 Act and section 135(1) of the Education (Scotland) Act 1980 (the "1980 Act"). ACC argues that a school in England will fall within the definition of an "independent school", as it is neither managed by a Scottish education authority, nor aided by a grant from the Scottish Ministers; and that the RNC is excluded from qualifying as an "independent school" because it does not provide education for pupils of school age.

8.3 The FtT failed to consider whether the RNC makes provision "wholly or mainly for children (or as the case may be young persons) having ASN", having regard to the definition of ASN in section 1(3) of the 2004 Act. ACC argues that that ASN are defined by reference to children or young persons of the same age in schools under the ACC's management; and that as RNC makes provision for persons aged 16 to 25, it is not provision wholly or mainly directed towards those of the same age as in schools in Aberdeen. ACC states that it advances this ground insofar as

section 1(3) of the 2004 Act bears upon the argument in Grounds 1 and 2, that it is fundamental to the definition of a school that it makes provision for pupils of school age.

Governing law

[9] Placing requests for children and young persons with ASN are governed by Schedule 2 of the 2004 Act (to which Section 22 gives effect). Provisions of the 1980 Act which apply to various other placing requests are disapplied by paragraph 1 of Schedule 2 to the 2004 Act. Paragraph 8 of Schedule 2 makes it clear that paragraphs 2 to 7 apply not only to children but also young persons with ASN. "Young person" is defined in Section 29 of the 2004 Act as a person (a) who is aged 16 years or over, (b) is a pupil at a school, and (c) has, since attaining the age of 16 years or over, remained a pupil at that or another school. It is not in dispute that LS is a young person within this definition.

[10] It is the duty of an education authority to comply with a placing request made under paragraph 2 of Schedule 2, and the education authority must meet the fees and other necessary costs of attendance at the requested school (paragraphs 2(1) and 2(2) of Schedule 2 of the 2004 Act). These duties are not absolute. Paragraph 3 of Schedule 2 sets out a list of exemptions from the duty to comply. Whether any of those exemptions apply in the present case is a matter still to be determined, because the FtT dealt only with one aspect of the case, whether a valid placing request had been made. ACC has indicated that, if necessary, it would seek to rely on paragraph 3(1)(f) in Schedule 2, which among other things allows factors of reasonableness and cost to be taken into account.

[11] The provisions under the 2004 Act which govern the schools to which placing requests may be made are in paragraph 2 of Schedule 2 of the 2004 Act, and provide as follows:

> "(1) Where the parent of a child having additional support needs makes a request to an education authority to place the child in the school specified in the request, being a school under their management, it is the duty of the authority, subject to paragraph 3, to place the child accordingly.
> (2) Where the parent of a child having additional support needs makes a request to the education authority for the area to which the child belongs to place the child in the school specified in the request, not being a public school but being–
> (a) a special school the managers of which are willing to admit the child,
> (b) a school in England, Wales or Northern Ireland the managers of which are willing to admit the child and which is a school making provision wholly or mainly for children (or as the case may be young persons) having additional support needs, or
> (c) a school at which education is provided in pursuance of arrangements entered into under section 35 of the [Standards in Scotland's Schools Act 2000]
> it is the duty of the authority, subject to paragraph 3, to meet the fees and other necessary costs of the child's attendance at the specified school.
> (3) A request made under sub-paragraph (1) or (2) is referred to in this Act as a "placing request" and the school specified in it is referred to in this schedule as the "specified school"."

"Education authority", on whom these duties are incumbent, is defined in Section 29(2) of the 2004 Act by reference to Section 135(1) of the 1980 Act. It means

"a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994, and

"area" in relation to an education authority shall be construed accordingly".

An education authority is therefore a Scottish local authority. There are other legislative provisions relevant to this appeal, but they are set out as part of the reasoning below.

The parties' arguments

[12] I am grateful to parties for providing summaries of their arguments to the UTS.

12.1 ACC argues that to qualify under paragraph 2(2)(b), the institution in question must be a (fee-paying) "school". The construction of "school" adopted by ACC is argued to be:

a) based on the plain terms of the legislation, which come down to the definition of "independent school" as a school at which full-time education is provided for pupils of school age (whether or not education is also provided for pupils over that age), there being no necessity in the circumstances to depart from this.

b) consistent with the general structure of the institutions education authorities are required to provide, which are principally for school age children, and the

1980 Act excluding any duty to make provision for further education (as defined in the Further and Higher Education (Scotland) Act 1992 as any programme of learning, not being school education, provided for persons over school age, the definition turning on age, not the course undertaken, and funded from central government).

c) consistent with paragraph 2(2)(a) which provides for an education authority to meet fees at a Scottish "special school", paragraph 2(2)(b) mirroring the duty in paragraph 2(2)(a) by providing for an education authority to meet the fees at an equivalent school in England and Wales or Northern Ireland.

d) and takes account of the point that additional support needs are referenced to the needs of pupils in schools in the education authority area, and it is accordingly a qualifying condition that the institution in question

makes provision "wholly or mainly" for the needs of such pupils (whether children or young people).

ACC argues that the RNC, as an educational establishment for 16 to 25 year olds, is not a school within the meaning of §2(2)(b). ACC also argues that LS's construction, being based on facts and circumstances, makes the parameters of the duty incumbent on education authorities unclear and exposes all concerned to disputes. ACC submits that an argument that this was the intention of Parliament is unattractive and should not commend itself to the UTS.

12.2 LS argues that the FtT did not err in law in concluding that the term "independent school" refers only to independent schools in Scotland. This is consistent with Sheriff Principal Caplan's decision in the case of *Lamont v. Strathclyde Regional Council* 1988 SLT (Sh Ct) 9 (at 12D). That being so, the context of paragraph 2(2)(b) of Schedule 2 of the 2004 Act requires the definition of school to be read as if the requirement to be a public school, grant-aided school or independent school were not there, this being the approach taken by the FtT. The proposition advanced by ACC, that an institution providing education only for young people and not for children as well cannot be a school, is found only in the definition of "independent school". That restriction applies only to independent schools (in Scotland) and is absent in the definitions of "school", "public school", "grant-aided school" and "special school". There is no justification for applying it in the context of paragraph 2(2)(b), not least because the wording of that paragraph "(or as the case may be young persons)" explicitly allows for a school making provision for young persons only. LS argues that the approach of the FtT should be upheld.

The 2004 Act

[13] The long title of the 2004 Act is "An Act of the Scottish Parliament to make provision for additional support in connection with the school education of children and young persons having ASN, and for connected purposes". The Act's purpose is to make provision for people with ASN in connection with school education.

[14] The 2004 Act allows provision of additional support for children and young persons in the area of an education authority not only in Scotland, but also elsewhere. Section 25 empowers education authorities to make arrangements for a child or young person with ASN to attend an establishment (whether or not a school) outwith the United Kingdom. Schedule 2(2)(b) makes provision for placing requests to schools in England, Wales and Northern Ireland. These provisions reversed the effect of the decision in *Lamont* v *Strathclyde Regional Council* 1988 SLT (Sh Ct) 9 confining placing requests to institutions in Scotland. There are provisions in other legislative instruments which may empower local authorities to assist with education for people with ASN outwith Scotland, including Sections 49 and 50 of the 1980 Act.

[15] Different countries have different education systems, which may not be organised in the same way as the Scottish education system. Different legislative frameworks may apply, which arrange and define educational institutions in ways which may not be identical between countries. For example, a comparison of definitions of some educational institutions in England (Section 83 of the Children and Families Act 2014, and Section 337 and 463 of the Education Act 1996) and Scotland (parts of Section 135(1) of the 1980 Act incorporated by Section 29 of the 2004 Act for ASN cases) reveal a number of differences.

[16] How then does the 2004 Act define the institutions to which a placing request may be made outwith Scotland? The parts of the 2004 Act about provision in England, Wales and

Northern Ireland may be contrasted with the section governing provision outwith the UK. The legislator has chosen different words. Section 25, which applies to provision outwith the UK, leaves an area of discretion to the education authority to make such arrangements as it considers appropriate, and allows "establishments (whether or not a school)" to be considered. (In a similar way, Section 49 of the 1980 Act empowers an education authority to pay bursaries, scholarships or other allowances to persons over school age "attending certain courses of full-time or part-time education (whether held in Scotland or elsewhere)". It is not specified that these must be in a school).

[17] Paragraph 2 of Schedule 2 on the other hand, which governs placing requests within Scotland and the rest of the UK, refers to schools. In certain circumstances it places a duty as opposed to a discretion on an education authority. What qualifies as a school under this paragraph is a question of statutory construction. The structure of paragraph 2 is that first, under paragraph 2(1), a person may ask to be placed in a school already under the management of the education authority to whom they are making the placing request (or under the management of another education authority when read with paragraph 2(5)). This essentially covers Scottish state schools, when paragraph 2(1) is considered in conjunction with the definition of education authority in Section 29(2) of the 2004 Act and Section 135(1) of the 1980 Act. Second, a person may apply to a school within paragraph 2(2). "Public schools" are expressly excluded from paragraph 2(2), public school being defined in Section 29 of the 2004 Act and Section 135(1) of the 1980 Act as "any school under the management of an education authority". They are presumably excluded because they are already covered in paragraph 2(1). Paragraph 2(2)(a) provides for requests to a school, which is defined in Section 29(1) of the 2004 Act as meaning a school, or any class or other unit forming part of a public school which is not itself a special school, the sole or main

purpose of which is to provide education specially suited to the ASN of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs. Paragraph 2(2)(b) covers schools in England, Wales or Northern Ireland, and paragraph 2(2)(c) certain schools concerned with early education. In summary under paragraph 2(2), people may request to be placed at (a) a special school, (b) a school in England, Wales or Northern Ireland which makes provision wholly or mainly for children or young persons having ASN, or (c) certain schools making provision for pre-school or children under school age.

[18] In this case, since LS has not requested a school managed by an education authority, paragraph 2(1) of Schedule 2 does not apply. Nor does paragraph 2(2)(c), because LS is 16. Paragraph 2(2)(a), special school, was not discussed by the FtT or relied on by LS, but bears further consideration. There may have been an assumption that this paragraph applies only to special schools in Scotland and not elsewhere. There is support for this assumption from three sources. First, specific provision exists elsewhere in the Act, in Section 25 and Schedule 2 paragraph 2(2)(b), for establishments outwith the UK and schools in the rest of the UK other than Scotland, which might imply that paragraph (a) is restricted to Scotland. Second, the Sheriff Principal in *Lamont* v *Strathclyde Regional Council* 1988 SLT (Sh Ct) 9 found that special school means a special school in Scotland, and a placing request for a school in England was not a valid placing request, albeit based on interpretation of statutory provisions which predated the 2004 Act. Third, the definition of special school in England (in Section 337 of the Education Act 1996) is significantly different from the definition in Scotland in Section 29(1) of the 2004 Act. In the absence of argument on this matter, I proceed on the basis that paragraph 2(2)(a) does not apply. But it is worth noting that if the reason for paragraph (a) not applying is because 'special school' only covers special schools

in Scotland, there are likely to be similar implications if the same definition is found to be read into paragraph 2(2)(b).

[19] That leaves paragraph 2(2)(b) of Schedule 2, considered by the FtT to cover RNC. It is not in dispute that the managers of RNC are willing to admit LS, and RNC is in England, so those requirements of the paragraph are met. What is in dispute is whether RNC is a "school" within the meaning of the legislation, and if so (as it applies to LS) if it is a school making provision wholly or mainly for young persons having ASN. I look at these two issues in turn.

Grounds of appeal 1 and 2: "school" within the meaning of paragraph 2(2)(b) of Schedule 2 to the 2004 Act

[20] In deciding what is a "school" within the meaning of this paragraph, the first port of call is the interpretation section of the 2004 Act. Section 29(2) provides a list of expressions and says they have the meanings given in Section 135(1) of the 1980 Act. Section 135(1) provides, insofar as relevant:

> "In this Act, unless the context otherwise requires:…
> "school" means an institution for the provision of primary or secondary education or both primary and secondary education being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school; and the expression "school" where used without qualification includes any such school or all such schools as the context may require".

I agree with the FtT that the definition of secondary education in Section 135(2)(b) of the 1980 is incorporated by the reference to it in the definition of school in the 1980 Act, even though not explicitly mentioned in Section 29 of the 2004 Act. This is in part because the definition is necessary to be able to apply the definition of "school" which has been expressly incorporated by Section 29(2), but also because it is the 2004 Act which inserted

amendments to the definition of secondary education relating to ASN. Section 135(2)(b) provides:

> "secondary education shall be construed as a reference to school education of a kind (i) which is appropriate in the ordinary case to the requirements of pupils who have attained that age; and (ii) which is, in the case of a pupil having additional support needs, within the provision made for the purpose of meeting those needs until he ceases to be of school age or to receive school education, whichever is the later, and any reference in any such enactment or other instrument as aforesaid to primary or secondary schools or departments or classes shall be construed accordingly."

The definition of school education in Section 135(1) of the 1980 Act is directly imported by Section 29(2) of the 2004 Act:

> ""school education" has the meaning assigned to it by section 1(5)(a) of the 1980 Act".

Section 1(5)(a) provides that "school education" means

> "progressive education appropriate to the requirements of pupils, regard being had to the age, ability and aptitude of such pupils, and includes— (i) early learning and childcare;…. (iii) the teaching of Gaelic in Gaelic-speaking areas".

[21] The words in the definition of school in Section 135(1) of the 1980 Act "being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school" are problematic in relation to schools in England and Wales. The words give a list of institutions which are defined in Scottish legislation, but the definitions are for institutions in Scotland. "Public school" is defined, under reference to Section 29(2) of the 2004 Act and Section 135(1) of the 1980 Act, in a way which means it can apply only in Scotland, because it is linked to management by an education authority. As set out in the governing law section above an education authority is a Scottish local authority. If that was the only problem, it might have been solved by the exclusion of public schools in the initial wording in paragraph 2(2) of Schedule 2. But there are other problems. Using the definition of school in Section 135(1) in paragraph 2(2)(b) of Schedule 2 would also import special

schools. But that cannot have been necessary if they were already covered in paragraph 2(2)(a) of Schedule 2. Or, if paragraph 2(2)(a) is read as limited to Scotland, the definition of special school given in Section 29(1) of the 2004 Act is not the same as the definition of special school used in England and Wales (Section 337 of the Education Act 1996). A special school in England is defined by reference to institutions which do not exist under the Scottish legislation, such as maintained and non-maintained schools and Academy schools, and the "sole or main purpose" test seen in the Scottish definition of special school is not part of the way special schools in England are classified. Nor is the definition of independent school contained in Section 135(1) of the 1980 Act, and imported into the 2004 Act by Section 29, the same as the definition of independent school in England in Section 463 of the Education Act 1996 as amended by the Children and Families Act 2014. Finally, as parties agreed before the FtT, there is no direct equivalent in England of a "grant-aided school" as defined in Section 135 of the 1980 Act, because there is no school in England in receipt of grants from the Scottish Ministers.

[22] How then is the word "school" in paragraph 2(2)(b) of Schedule 2 to be interpreted, as it applies to institutions in England, Wales and Northern Ireland? As set out in the summaries of the parties' arguments above, there is a dispute between the parties. ACC argues that "school" in paragraph 2(2)(b) can only be an independent school as it applies to institutions in England, Wales and Northern Ireland. Under the Scottish statutory definition of independent school, a school will only qualify if it provides education for pupils of school age. RNC cannot therefore be a school within paragraph 2(2)(b). LSS on the other hand argues that since Section 135(1) starts with the words "unless the context otherwise requires", it should be found that the context does otherwise require in respect of "school" in paragraph 2(2)(b) of Schedule 2. The definition of school as it applies in paragraph 2(2)(b)

should be read as if the words "being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school" were not in it. RNC qualifies within the wording of paragraph 2(2)(b) as so interpreted.

[23] On balance I prefer the approach of the FtT and LS on this matter. I accept that the definition of independent school incorporated by Section 29 into the 2004 Act from Section 135(1) of the 1980 Act is as follows:

> "'independent school' means a school at which full-time education is provided for pupils of school age (whether or not such education is also provided for pupils under or over that age), not being a public school or a grant-aided school".

I also accept that this definition imports the concept of "school age" defined elsewhere in the 1980 Act (Section 135(1) and Section 31). Subject to some exceptions, a person is of school age if they have attained the age of five years and have not attained the age of sixteen years. Accordingly, the definition of an independent school in Scotland is tied to it providing full-time education for pupils of school age. What I do not accept is that this definition is the test for whether there is a valid placing request to a school in England, Wales and Northern Ireland under paragraph 2(2)(b) of the 2004 Act, for the following reasons.

1. First, ACC's reading of the legislation is highly selective.

    (a) It involves choosing only one of a number of types of institution listed in the definition of school in Section 135(1) of the 1980 Act. It was not explained to me why it should be the case that only fee paying schools in England and Wales could be the subject of placing requests under paragraph 2(2)(b) of Schedule 2, although this was a consequence of ACC's interpretation. Picking only the definition of "independent school" also involves leaving out the specification in Section 135(1) that school includes a nursery school and a special school. ACC's approach potentially excludes

many nursery schools since this type of early learning and childcare is typically for people who are not school age, and not all nurseries are attached to institutions offering education to school age pupils. ACC's approach also leaves out special schools, even though special schools outwith Scotland may not be covered by paragraph 2(1)(a) for reasons set out above. Given that special schools often exist to provide education pupils with ASN, it might be thought this is a particularly appropriate type of school to be the subject of a placing request in the rest of the UK. ACC's approach also involves picking the only type of school referred to in the Section 135(1) definition of school defined by reference to school age. Definitions of grant-aided school, nursery school, public school, and special school in Section 135 of the 1980 Act and Section 29 of the 2004 are not expressly defined by reference to school age. I consider there is force in the argument of LS that if paragraph 2(2)(b) of Schedule 2 only applies to independent schools it would have been simple to say so. It is significant that was not the approach taken by the legislature.

(b) ACC's argument also selects only parts of the definition of "independent school" in the Scottish legislation. The definition of "independent school" in Section 135(1) of the 1980 Act expressly depends in part on a school "not being a public school or a grant-aided school". As set out above, a public school is defined so it is only satisfied by schools managed by Scottish local authorities, and parties agreed before the FtT that grant aided schools was not a definition applied to English schools. ACC submits that this is dealt with by just finding there are no such schools in England, Wales or Northern Ireland to which a placing request can be made.

But the question arises why these types of schools are in a definition which applies for institutions in England, Wales and Northern Ireland, if the words could have no meaningful application. Further, ACC's argument is inconsistent with the finding in *Lamont* v *Strathclyde Regional Council* 1988 SLT (Sh Ct) 9 at 12 B that "independent school" as defined under the 1980 Act means a school in Scotland, not elsewhere. Although the definition of independent school in Section 135(1) of the 1980 Act has changed since this case was decided, it still includes the key word "pupils" on which the dicta turned. Finally, what counts as an independent school in England under legislation in force there (Section 463 of the Education Act 1996) is not the same as in Scotland. There is no clear rationale for trying to identify English independent schools by reference to a different definition of independent school from that which actually governs them.

2. Second, ACC's argument, that whether a school is eligible or not depends on provision for children of school age, sits uneasily with paragraph 9 of Schedule 2. The clear intention of the 2004 Act is to make provision for additional support for the school education of children "and young persons" having additional support needs. Paragraphs 2 to 7 of Schedule 2 expressly apply to young persons, not just children (paragraph 9 of Schedule 2). As noted above, there is a statutory definition of young person in Section 29 of the 2004 Act; by definition they are not of school age because they must be over 16. Young persons may have different needs to children. Given that the 2004 Act intends to make provision for young persons, it appears anomalous to make that provision in England, Wales and Northern Ireland turn on provision for people who are not young persons. ACC's argument also takes insufficient account

of the obvious overlap between school and further education for persons who have reached 16. School education does not stop at 16, although it is no longer compulsory after that age is reached. It is common for pupils to receive school education after reaching 16, and the years of school education after 16 are seen as important years for obtaining national qualifications. ACC remains responsible for school education for those aged 16 and beyond. The approach of ACC would involve significantly limiting the institutions in England and Wales providing education for people of 16 or over with ASN to which placing requests could be made. The choice of pupils of 16 or over would be restricted, although there is no express indication in the 2004 Act that young persons with ASN were to be limited in this way.

3. Third, I do not accept that classification in Scotland between secondary and further education is determinative of whether there is a valid placing request for a school in England, Wales or Northern Ireland. ACC argues that its interpretation is consistent with the general structure of educational institutions in Scotland. I accept that under Section 1(2A) of the 1980 Act, the duty imposed on an education authority shall not include the provision of further education. I also accept that the Further and Higher Education (Scotland) Act 1992 defines further education as "any programme of learning, not being school education, provided for persons over school age…". But the question before the UTS is the correct construction of the 2004 Act. Aspects of other Acts cannot simply be read into the 2004 Act where they are not incorporated (*Somerville* v *Scottish Ministers* 2008 SC (HL) 45 paras 23, 25, 110, 112-113, 115, 132-133, 166). Schedule 2 paragraph 2(2)(b) does not use classification as further education as the touchstone to determine the institutions to which placing

requests may be made. Scotland may have particular statutory divisions of responsibility for educational institutions, but it does not follow that those divisions exist in the same way in other countries, or that they should be used when considering which schools placing requests may be made to in different educational systems.

4. Fourth, I consider ACC's concerns about uncertainty and excessive financial responsibility to be overstated. The interpretation advanced by LS (and the FtT) still requires defined statutory conditions to be met before an institution falls within paragraph 2(2)(b) of Schedule 2. In particular, a school will only be eligible if it is in England, Wales or Northern Ireland, its managers are willing to admit the person, it provides primary or secondary education or both primary and secondary education (as defined), and it makes provision wholly or mainly for children (or as the case may be young persons) having additional support needs (as defined). Although I acknowledge that Schedule 2 paragraph 2 imposes a duty (and not merely a discretion) on education authorities to comply with placing requests in certain circumstances, in my opinion the definition adopted by the FtT is sufficiently certain to define the boundaries of that duty. In relation to financial liabilities, an example is given by ACC of a request for placement at the Royal Academy of Music, since additional support needs could apply to highly able pupils as well as disabled pupils. It was submitted that the removal of an upper age limit for a young person in Section 29(1) of the 2004 Act could mean a number of years of such provision. While financial constraints are a legitimate concern for education authorities, the argument paid insufficient attention to the existing position (under which responsibility for funding secondary education for people with ASN in its area

already lies with ACC) and the conditions which apply before a school is eligible under paragraph 2(2)(b) of Schedule 2. Finally, the fact that a placing request is valid does not mean it must in all cases be met. Paragraph 3 of Schedule 2 provides an extensive list of exemptions. Paragraph 3(1)(f) is mentioned by ACC in this case, and that includes among other things a test of reasonableness. Factors such as suitability and cost (which will be affected by duration) may be taken into account. The 2004 Act includes a system of regular reviews (Section 10). There are therefore clearly defined limits on the duty and financial responsibilities imposed by the 2004 Act on ACC.

5. Finally, ACC's arguments about consistency with the definition of a special school, and the qualifying condition making provision wholly or mainly for the needs of pupils with additional support needs, do not in my opinion add support to its argument. The interpretation of paragraph 2(2)(b) of the 2004 Act adopted by the FtT leaves as a condition which must be met "and which is a school making provision wholly or mainly for children (or as the case may be young person) having additional support needs". That requirement is there regardless of whether ACC's interpretation or LS's interpretation is selected.

[24] In all of the circumstances, I do not accept ACC's restrictive approach to the interpretation of paragraph 2(2)(b) of Schedule 2 of the 2004 Act. In my opinion, it is preferable to recognise that it cannot have been intended to specify educational institutions in England, Wales and Northern Ireland to which placing requests might be made by reference to a list of educational institutions defined for Scotland. Section 135(1) of the 1980 Act starts with the words "unless the context otherwise requires". Giving effect to those qualifying words, the context requires only part of the definition of "school" in

Section 135(1) of the 1980 Act to be read as imported by Section 29(2) into paragraph 2(2)(b) of Schedule 2 of the 2004 Act in its application to schools in England, Wales and Northern Ireland. The words "being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school" should not be applied when considering a placing request under paragraph 2(2)(b) of Schedule 2. I agree with the FtT that when the words I have specified are removed, there remains a perfectly workable definition which focusses on the substance of the provision and not it's labelling. "School" should be taken as meaning an institution for the provision of primary or secondary education or both primary and secondary education, in accordance with the definitions set out in paragraph 20 above. The meaning of primary and secondary education is set out in the 1980 Act and capable of cross border application. I acknowledge that, as a result, a more limited definition of school applies under paragraph 2(2)(b) of Schedule 2 than may apply in other parts of the 2004 Act, but that is the consequence of a statutory provision which expressly provides that a definition in it applies unless the context otherwise requires. Whether or not an institution requested falls within paragraph 2(2)(b) of Schedule 2 as defined above will be a question of fact.

[25] It follows that I refuse the appeal on grounds 1 and 2 advanced by ACC. Both are predicated on the argument that placing requests can only be to schools which provide education for pupils of school age (essentially 5-15 year olds). I do not consider this is a requirement of paragraph 2(2)(b) of Schedule 2 when properly interpreted, for reasons set out above. I consider the approach of the FtT, in reading paragraph 2(2)(b) in the way it did and determining whether that test was met on the evidence, was correct. Many decisions taken by local authorities turn on a view being taken of the facts, and I do not accept that the FtT's approach makes the parameters of the duty incumbent on educational authorities

unclear. I endorse the clearly expressed approach of the FtT, other than the definition of school education it set out in paragraph 45 which has subsequently been updated, and its factual findings in the first three sentences of paragraph 14, and paragraph 41 of the decision insofar as it relies on those factual findings. There is no appeal before me on the basis of error in fact, or any argument that further evidence produced by ACC complies with the conditions in Rule 18(4) of the Upper Tribunal for Scotland Rules of Procedure 2016 (the "**UTS Rules**"). As the findings I have referred to were not material to the outcome, I need say no more about them.

Ground of Appeal 3: Did the FtT err in failing to consider whether the RNC makes provision "wholly or mainly for children (or as the case may be young persons) having ASN", having regard to the definition of ASN in section 1(3) of the 2004 Act?

[26] ACC's third ground of appeal raises issues about Section 1 of the 2004 Act. Section 1(1), as it applies to young persons, defines needs for additional support as follows:

> "where, for whatever reason, the young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the young person".

Under Section 1(3), additional support means:

> "provision, whether or not educational provision, which is additional to, or otherwise different from, the educational provision made generally for…. young persons of the same age in schools (other than special schools) under the management of the education authority responsible for the school education of the …young person…"

ACC's third ground of appeal focusses on the words "a school making provision wholly or mainly for children (or as the case may be young persons) having ASN" in paragraph 2(2)(b) of Schedule 2. ACC argues that the FtT erred by failing properly to consider this part of the paragraph, and in particular by failing properly to take into account the effect of the

definition of additional support in Section 1(3) of the 2004 Act. The argument, like the earlier grounds of appeal, focusses on the age of people for whom education is provided. ACC argues that ASN are defined by reference to children or young persons of the same age in schools under the ACC's management. RNC's provision is for ages 16-25. ACC argues that this is not provision wholly or mainly directed towards those of the same age as in schools in Aberdeen, because ACC does not provide education for people beyond approximately 18. The argument is consistent with ACC's position under Grounds 1 and 2 that school education has as its primary focus school age children. This argument was not expressly raised by ACC at the hearing of the preliminary issue before the FtT, although it was raised on review and appeal. In the FtT, the legal member determining the review rejected it, and the legal member determining permission refused permission on this particular ground (permission was ultimately granted by the UTS).

[27] It is evident from the FtT's decision that it did not fail to consider the part of the test in paragraph 2(2)(b) of Schedule 2 reading "a school making provision wholly or mainly for children (or as the case may be young persons) having ASN". The FtT expressly found at paragraph 58 that RNC is a school making provision wholly or mainly for young persons having ASN. That was the correct approach to take to application of the test in paragraph 2(2)(b), because it says "children (or as the case may be young persons)". There is no dispute that this placing request concerned a young person, since LS was 16 and at school, and she met the definition of young person in Section 29(1) of the 2004 Act. There is no upper age limit on young persons in the 2004 Act. LS submitted this was a deliberate amendment to take account of the needs of some people with ASN for additional support. The words "as the case may be" meant the FtT was correct to be considering young persons when applying this part of the test. The finding made by the FtT at paragraph 58 was

reasonably open to it on the basis of its earlier findings. Finding in fact 11 shows there were people of the age of young persons at RNC. It also found that RNC is a specialist residential college of further education and training for people who are blind or partially sighted. There were further findings about the educational provision at RNC for blind or partially sighted pupils (11-13, 17-18). Also relevant is the absence of dispute in this case that LS has ASN. The type of difficulties from which LS suffers (which were the subject of factual findings in paragraph 9 of the FtT's decision) need (in the sense set out in Section 1(1) of the 2004 Act) support additional to the educational provision made generally for young persons the same age as her in schools (other than special schools) under the management of ACC. Thus the requirements of Section 1(3) are met. RNC's pupil base is blind or partially sighted pupils, as found in paragraph 11. In the circumstances, it was an inference reasonably open to the FtT that RNC makes provision wholly or mainly for young persons with ASN. I cannot discern any requirement in paragraph 2(2)(b) of Schedule 2, even when read with Section 1(3), that the FtT had to compare the age ranges of educational provision by ACC and RNC, and reject the RNC as a school if it also provided education for persons over 18. I discern no error on a point of law in the FtT's approach. I do not consider the FtT can be faulted to failing to provide fuller reasoning on this point when determining the preliminary issue, given that the issue was not focussed before it. It follows that I also reject the third ground of appeal.

Conclusion

[28] For these reasons I decline the invitation of ACC to quash the decision of the FtT and remake it. Under Section 47(1) of the Tribunals (Scotland) Act 2014 (the "**2014 Act**"), I uphold the decision of the FtT on the preliminary issue, finding that the request for LS to be

placed at RNC was a placing request under the 2004 Act. The case, unless appealed further, will now return to the FtT to determine the other matters in issue between the parties.

Observations

[29] In finishing, I make some obiter comments about procedure. From the FtT papers, the initial placing request was made in or around February 2020 (A017). It was for a placement commencing in September 2020. After refusal by ACC on 8 June 2020, an application was made to the FtT, received on 25 June 2020. An application to the FtT concerning a placing request under the 2014 has at its heart the education of a child or young person with ASN. It is important that the application proceeds as expeditiously as it can. I mention four ways in which procedure under the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (the "**FtT Rules**") might be operated to reduce delay.

1. Preliminary issues. Because this case is a reference under Section 18(1) of the 2004 Act, Parts 1 and 2 of the FtT Rules applied to its determination. There is power under Rule 22 of the FtT Rules to decide matters as preliminary issues, but it is a qualified power. First, on the wording of Rule 22, the power arises where the issue "must be" determined prior to the substantive hearing of the reference, and if it cannot be determined by the giving of directions under Rule 25. Second, in exercising a procedural power under the FtT Rules, the FtT must seek to give effect to the overriding objective, and claims are to be managed actively in accordance with the overriding objective (Rule 3). The overriding objective is to deal with references or claims fairly and justly, and one of the factors which can be considered is avoiding delay so far as compatible with the proper consideration of the issues (Rule 2(2)(e)).

If the FtT is considering making procedural orders, including to decide an aspect of the case as a preliminary issue, it is subject to Rules 2 and 3. Agreement of parties as to procedure is a factor but is not conclusive; the FtT must actively manage the case in accordance with the overriding objective. It may accord with fairness and justice to decide all issues at once, even if it makes an initial hearing in the FtT slightly longer. It is possible that another point may in any event determine the overall outcome (in this case an example would be if one of the exemptions in paragraph 3 of Schedule 2 of the 2004 Act applied). Hearing all issues together may avoid the need for multiple hearings, review and appeal processes which may arise if issues are split up. I acknowledge there may be some cases in which the criteria in Rule 22 of the FtT Rules are met, and that after balancing all relevant considerations in the light of overriding objective the FtT may properly proceed to determine a particular matter as a preliminary issue. In this case, the papers before me do not show the basis on which the FtT considered that the issue "must be" decided as a preliminary matter within Rule 22, or what consideration the FtT gave to the overriding objective and the avoidance of delay in deciding to hear part of the case as a preliminary issue.

2. Determination of reviews and applications for permission to appeal in the FtT. ACC made a joint application for review and permission to appeal to the FtT. There is nothing in the FtT Rules to prevent such a joint application (although it would be advisable for grounds of review to be framed in the light of the discussion in the next paragraph). The same grounds considered in this UTS appeal were advanced for both review and appeal, and there was an additional ground of factual error in relation to the FtT's finding in paragraph 14. In response, there was a protracted procedure in the FtT, under which a different member decided whether

there should be a review, then the original member carried out the review, the FtT requested a separate application for permission, and then the other member decided whether to grant permission to appeal. There are particular procedural requirements for determination of a review in the FtT under Rule 11 (in contrast to permission to appeal under Rules 9 and 10). But once those have been complied with, there does not appear to be anything express in the FtT rules preventing the legal member who made the impugned decision determining both the review application and the application for permission to appeal at the same time, which may reduce delay. (Reviews under Rule 11 should where practicable be undertaken by one or more of the members who made the initial decision). The same legal tests apply, whoever determines reviews or applications for permission to appeal. There is a safeguard in that, if a prospective appellant is dissatisfied with the FtT's decision to refuse permission to appeal on some or all of the grounds advanced, an application for permission may be made to the UTS (Rule 3(6) of the UTS Rules), where it will be determined by a different person.

3. The approach to review. The grounds of review and appeal presented to the FtT by ACC raised a number of legal points. Reviews are governed by Sections 43 to 45 of the 2014 Act and Rule 11 of the FtT Rules. Under Rule 11, the FtT is given a power to review any decision "where it is necessary in the interests of justice to do so". In the 2014 Act there is also provision for appeals on points of law in Sections 46 and 47, and the FtT Rules 9 and 10 govern such appeals. Prior to the oral hearing of this appeal I invited parties to make submissions on the approach to review in the UK Tribunals system under the Tribunals, Courts and Enforcement Act 2007 (the "**2007 Act**"), in cases such as *R(RB)* v *FTT* [2010] UKUT 160 *AAC and B* v

Worcestershire CC [2010] UKUT 292 AAC (principles recently affirmed in the Court of Appeal in *Point West GR Ltd* v *Rita Bassi* and others [2020] EWCA Civ 795). Although there are some differences between the two tribunal systems, neither party challenged the application of the well-established UK Tribunals approach to reviews. Given the availability of an appeal on a point of law, in my opinion, a review is unlikely to be in the interests of justice within Rule 11 of the FtT Rules if what is being challenged is merely an arguable point of law. Set aside powers on a review under Section 44(1)(b) of the 2014 Act in my view cover situations in which there has been a clear error of law, which may encompass some material errors in fact. Review is primarily intended for cases where a decision is plainly wrong, so avoiding the need for an appeal that would inevitably succeed. This might happen, for example, if a binding legal authority or provision has been overlooked. It should be relatively obvious where this type of error exists, with the result that a review need not be an unduly time consuming exercise. Review is not intended to usurp the function of the UTS to determine appeals on contentious points of law.

4. Reasons on applications for permission to appeal. The test for grant of permission to appeal is whether there are arguable grounds for the appeal (Section 46(4) of the 2014 Act). The FtT Rules require reasons to be given only where permission to appeal on any point of law is refused (Rule 10(3)(a)). If it is decided that permission should be granted, the FtT Rules do not require a statement of reasons; the FtT need provide only a "record of its decision" (Rule 10(2)). Where permission is granted, it may not be necessary to say much more than that grounds of appeal in respect of which permission has been granted are arguable. (The UTS has powers to make further procedural orders under Rules 7, 8 and 18 if permission

has been granted). This approach may save judicial time and avoid unnecessary delay, and also avoids any impression of pre-judgement of issues to be decided in the substantive hearing of the appeal.