Upper Tribunal for Scotland

[2021] UT 17
UTS/AP/19/0016

DECISION OF LADY CARMICHAEL

On an appeal

in the case of

MIDLOTHIAN COUNCIL, THE EDUCATION AUTHORITY, Dalkeith EH22 1DN
per Mr Jonathan Guy, Anderson Strathern LLP,
1 Rutland Court, Edinburgh, EH3 8EY

Appellant

and

PD c/o MS JENNIFER BARR, 18-20 Orkney Street, Govan Law Centre, Glasgow, G51 2BZ
per Mr John Moir Advocate, Govan Law Centre,
18-20 Orkney Street, Glasgow G51 2BZ

Respondent

FTT Case Reference FTS/HEC/AR/18/0038

11 NOVEMBER 2019

Decision

The Upper Tribunal in terms of section 47 of the Tribunals (Scotland) Act 2014 quashes the decision of the First-tier Tribunal dated 14 March 2019 and remits the reference to a differently constituted First-tier Tribunal.

Introduction

[1] The respondent brought a reference under section 18 of the Education (Additional Support for Learning (Scotland) Act 2004 ("the 2004 Act") in respect of the appellant's refusal of a placing request regarding her son. She had requested that he be placed at School A.

[2] It was agreed in a Joint Minute of Admissions before the First-tier Tribunal ("FTT") that the child has additional support needs in terms of the 2004 Act as a result of the following factors: a mild learning disability; significant difficulties with perceptual reasoning, working memory and processing speed; dyslexia; sensory difficulties; noise sensitivity; impaired fine motor skills; self-harming behaviours including cutting; difficulties in managing peer interactions and regulating himself while with peers; very low self-confidence and self-esteem, a poor understanding of risk, and difficulties with self-regulation and impulse control.

[3] In resisting the reference the appellant relied on paragraphs 3(1)(b) and 3(1)(g) of Schedule 2 to the 2004 Act. The FTT overturned the decision to refuse the placing request, and required the appellant to place the child at School A with immediate effect. The appellant's position was that the child should be educated at the Creative Learning Department of School B.

[4] On 15 August 2019, I granted permission for the appellant to appeal against the decision of the FTT.

Relevant statutory provisions

[5] The powers of the FTT in a reference of this type are provided in section 19(4A) of the 2004 Act:

"Where the reference relates to a decision referred to in subsection (3)(da) of that section the First-tier Tribunal may—

(a) confirm the decision if satisfied that—

(i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and

(ii) in all the circumstances it is appropriate to do so,

(b) overturn the decision and require the education authority to—

(i) place the child or young person in the school specified in the placing request to which the decision related by such time as the First-tier Tribunal may require,

and

(ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the First-tier Tribunal considers appropriate by such time as the First-tier Tribunal may require."

[6] The first task for the FTT was, therefore, to consider whether it was satisfied that the grounds mentioned in paragraph 3(1)(b) and/or paragraph 3(1)(g) existed. It is common ground that the onus was on the appellant to establish the existence of one these grounds.

[7] Paragraph 2 of Schedule 2 to the 2004 Act places, broadly speaking, a requirement on education authorities to comply with, or provide funding for, placing requests by the parents of children with additional support needs. Paragraph 3 provides, so far as is material:

"(1) The duty imposed by sub-paragraph (1) or, as the case may be, sub-paragraph (2) of paragraph 2 does not apply–

(b) if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child,

…

(g) if, where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the 2000 Act."

[8] Section 15 of the Standards in Scotland's Schools etc Act 2000 ("the 2000 Act") provides:

"(1) Where an education authority, in carrying out their duty to provide school education to a child of School Age, provide that education in a school, they shall

> unless one of the circumstances mentioned in subsection (3) below arises in relation to the child provide it in a school other than a special school.
> …
>
> (3) The circumstances are, that to provide education for the child in a school other than a special school–
> (a) would not be suited to the ability or aptitude of the child;
> (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or
> (c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,
> and it shall be presumed that those circumstances arise only exceptionally.
>
> (4) If one of the circumstances mentioned in subsection (3) above arises, the authority may provide education for the child in question in a school other than a special school; but they shall not do so without taking into account the views of the child and of the child's parents in that regard."

[9] The effect of section 15 is to create a fairly strong presumption in favour of educating a child in a school other than a special school. It was common ground in the appeal to the Upper Tribunal that School A is a special School As defined in section 29(1) of the 2004 Act, and that neither School B nor the CLD within it is a special school. There is no statutory definition of "mainstream", and parties proceeded on the basis that the expression was used to describe a school which was not a special school.

[10] The FTT required to consider whether it was satisfied that the education normally provided at the specified school, School A, was not suited to the age, ability or aptitude of the child (paragraph 3(1)(b)).

[11] The FTT required to consider also whether it was satisfied that the education in a school other than a special school, namely School B, was suited to the child's ability and aptitude and was not incompatible with the provision of efficient education for the children with whom he was educated (paragraph 3(1)(g)). It required to do so bearing mind the presumption that the circumstances that education in a school other than a special school

would be unsuited to a child's ability and aptitude, and that it would be incompatible with the provision of efficient education for the children with whom he would be educated, arise only exceptionally. There was no contention that educating the child in a school other than a special school would result in unreasonable public expenditure.

[12] Appeal to the Upper Tribunal against the decision of the FTT is on point of law only: Tribunals (Scotland) Act 2014, section 46(2)(b).

Summary of submissions

Appellant

[13] The grounds of appeal advanced were these.

(a) The tribunal reached a decision that was so extravagant that no reasonable tribunal properly directing itself on the law could have arrived at and in so doing failed to provide proper and adequate reasons for its decision.

(b) The tribunal misdirected itself in law.

(c) The tribunal entertained the wrong issue and took into account manifestly irrelevant considerations and made findings for which there was no evidence.

(d) The tribunal's findings were inconsistent with the evidence.

[14] Mr Guy referred to a number of authorities relating to what constitutes an error of law, and in particular: *CF* v *MF* [2017] CSIH 44, Lord Drummond Young, paragraph 9. Rule 48 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018, (SSI 2017/366) required the FTT to provide a full statement of the facts found by it and the reasons for its decision. A failure to provide adequate reasons was an error of law: *R (Iran)* v *Secretary of State for the Home Department* [2005] EWCA Civ 982, paragraphs 9-10; *Nixon (permission to appeal: grounds)* [2014] UKUT 00368, paragraph 10.

[15] A decision must leave the informed reader in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it: *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345, at pages 347-348. A statement of reasons must identify what the decision maker decided to be the material considerations; must clearly and concisely set out his evaluation of them; and must set out the essence of the reasoning that has led him to his decision: *Ritchie* v *Aberdeen City Council* 2011 SC 579, Lord President (Gill) at paragraph 12; *JC* v *Midlothian Council* [2012] CSIH 77, Lord Menzies, paragraph 30, citing *Uprichard* v *Scottish Ministers* 2012 SC 172, Lord President (Gill) at paragraph 26. It was necessary to read the reasons as a whole: *City of Edinburgh Council* v *MDN* 2011 SC 513, paragraph 28.

[16] At the heart of the appellant's grounds of appeal were the propositions that the FTT misdirected itself by failing to address the legal tests set out in paragraph 3(1)(b) and (g) of the 2004 Act, and that it had failed to give adequate reasons for rejecting the evidence of witnesses led by the appellant. The four grounds of appeal largely reflect differing articulations of those two propositions. In advancing them Mr Guy drew attention to a number of passages in the decision of the FTT. In considering paragraph 3(1)(b), and whether the education normally provided at School A was not suited to the age, ability or aptitude of the child, the FTT did not address that question directly, but rather embarked on a comparison between School A and School B. That comparison was irrelevant to its task.

[17] The FTT had erred in a similar way so far as paragraph 3(1)(g) was concerned. The passages dealing with the questions of whether School B would not be suited to the child's ability or aptitude, and whether the provision of education to him there would be incompatible with the provision of efficient education for the children with whom he would

be educated, contained irrelevant material about the provision at School A, and again involved a comparison of the education available at the two establishments.

[18] The FTT had failed to give adequate reasons for rejecting the evidence of the appellant's witnesses. The reasons, such as they were, given by the tribunal fell to be contrasted with those given by the FTT in *JC* for rejecting the evidence of a witness. Those were narrated at length and considered by the Inner House: *JC*, paragraph 26. The FTT had failed to engage at all with the evidence as to the nature of the education which the appellant proposed to provide to the child at School B.

[19] The FTT had left out of account, without explanation, or adequate explanation, evidence given by the appellant's witnesses.

Respondent

[20] Mr Moir recognised that the decision of the FTT was deficient in certain respects. Some of what purported to be findings in fact were not findings in fact. Comparisons of the two facilities were not relevant to the FTT's task, and parts of the decision which appeared to be intended to deal with particular statutory provisions contained information and consideration irrelevant to those statutory provisions. There was, as a result, some potential for confusion as to whether the statutory tests had been applied correctly. Despite these infelicities, however, the FTT had not made any material error of law. Mr Moir submitted that the FTT had correctly identified the fundamental issue in the case as being whether the child could be educated in mainstream – that is, in a school other than a special school. The CYPMAP, on which the FTT had been entitled to rely, included statements such as:

> "Mainstream school has proved ineffective for the child and he has not attended mainstream school since approximately November 2014.

> The child is likely to require a bespoke educational package built around a specialist provision placement as he will be unable to return to mainstream at present."
>
> "As the child has been out of a formal learning environment for so long, he will need a lot of support to develop his skills and build back up to full time education. It is not likely that he would be able to cope with a mainstream high school environment at present given his schooling history and barriers to learning."

The FTT had also recorded and relied on the evidence of Ms Joanne Findlay, the head teacher of the child's primary school, to the effect that he could not presently manage within mainstream.

[21] The FTT was entitled to take this evidence as a basis for concluding that the provision of education to the child of education in a school other than a special school would not be suited to his ability or aptitude.

[22] The FTT was entitled to reject the evidence of the witnesses led by the appellant, particularly where their evidence could be regarded as usurping the function of the tribunal: *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59, at paragraph 49. The FTT was an expert tribunal. Its findings were entitled to respect, and should not be interfered with lightly: *City of Edinburgh Council* v *K* 2009 SC 625, paragraph 16. Mr Moir did not take issue with the propositions derived by the appellants from the authorities referred to by them and summarised above.

[23] Further, the FTT had gone on to consider whether it was in all the circumstances appropriate to confirm the appellant's decision, and had decided that it was not. I understood Mr Moir to be submitting that even if there were any error of law in relation to whether one of the specified grounds of refusal had been established, that was not a material error. That was because the FTT had considered all the circumstances and decided that it should not confirm the decision. Although the comparison of the two facilities and

consideration of the better environment in which to reintegrate the child into education was irrelevant in relation to the specified grounds, it was relevant to the question whether it was in all the circumstances appropriate to confirm the appellant's decision.

Decision

[24] For the reasons set out below, I have decided to allow the appeal and remit the appeal to a differently constituted FTT. Although the appellants initially, in their written submission, asked me to remake the decision of the FTT and confirm the decision of the appellants, Mr Guy acknowledged that the appropriate disposal would be to set the decision aside and remit the matter to a differently constituted FTT.

[25] So far as the adequacy of reasons given by the FTT is concerned, I accepted the submissions recorded at paragraph 15 as reflecting the approach I ought to take.

Paragraph 3(1)(b) – Whether the education normally provided at School A was not suited to the age, ability or aptitude of the child

[26] In considering paragraph 3(1)(b), and whether the education normally provided at School A was not suited to the age, ability or aptitude of the child, the FTT did not address that question directly, but rather embarked on a comparison between School A and School B which was not relevant to the question focused by the terms of that provision. This is demonstrated by passages of reasoning such as the following:

> "The child's parents are seeking the opportunity to reintroduce the child to education in a more structured setting than the mainstream setting of School B. … School B cannot meet the personal care needs of the child.
>
> "School A is a smaller, more supportive, less stimulating specialist provision for the child. This is a significantly important time for the child and the Tribunal unanimously concluded that the best possible chance of success for child to

> reintegrate back into education would be in the setting of School A. The child will receive the necessary support he needs at School A as they are well skilled to address the child's complex needs within a special school setting. The mainstream of School B is completely inappropriate for the child at this time."

[27] The repeated references in this section of the decision to the provision of education at School B produce the impression that the FTT did not focus, as it required to, on the suitability of the education at School A for the child's age, ability and aptitude. The FTT ought to have been considering the education normally provided at School A, and whether it was satisfied that it was not suited to the child's age, ability or aptitude. In that consideration the education provided at School B was irrelevant. Which facility would be the better setting for the child's integration into education was irrelevant. In taking that matter into account the FTT erred in law.

[28] The section of the decision dealing with paragraph 3(1)(b) contains remarkably little information about the education actually provided at School A and its suitability for the child's age, ability and aptitude. There is some consideration of the level of the Curriculum for Excellence at which pupils there work, and of the level at which the child worked when he was last in education. What is missing, however, is any more significant discussion here of the education normally provided at School A. It is not a deficiency remedied by any of the findings in fact.

[29] I have concluded also that the FTT failed to give adequate reasons for rejecting the evidence led by the appellant regarding the unsuitability of the education provided at School A to the child's age, ability and aptitude. The appellant led evidence from Mr Stephen Buggy, the head teacher at School A. The FTT did note that Mr Buggy had not met the child. Apart from that, the reasons for rejecting his evidence, and indeed the evidence of all the witnesses led by the appellants, are in the following terms. The passages

appear at pages 12 and 14 of the decision, which are not in the section of the decision which bears to relate to paragraph 3(1)(b):

> "The Tribunal prefers the evidence of the child's father in respect of where best to reintegrate the child back into school education at this stage. The Tribunal was in no doubt that the child's father was a credible and reliable witness who knew his son better than anyone. The child's parents also know School B and School A well. They have visited both schools. They have children currently attending both schools. The Tribunal, whilst appreciating and understanding some of the concerns raised by the Authority's witnesses found the evidence of the child's father highly compelling."
>
> …
>
> "Whilst the Tribunal noted the reservations the Authority's witnesses expressed in their evidence about School A, the Tribunal formed the view that School A is the safest more supportive and appropriate specialist placement for the child and provide him with the gateway for his critical transition of returning to education. Fundamentally the child should not be placed in a mainstream setting at this stage. School B is an inappropriate placement for the child.
>
> We respect the professional opinions of the witnesses but the priority right now for the child is to get him back into education as quickly as possible. The child should be allowed to attend School A and get the support of the professionals therein. We fully accept the evidence of Mr Buggy that he, and the rest of the school, would do everything to support the child and make the placement work."

[30] I observe, first, that the FTT's preference of the child's father's evidence is couched in terms of its relevance to the question of "where best to reintegrate the child into school education at this stage". That was not one of the questions that the FTT required to ask itself in the first instance, and is irrelevant to the consideration of the specified grounds of refusal. The reasoning says nothing about what the child's father may have been able to contribute regarding the nature of the education provided at either school, its suitability to the child's ability or aptitude, or the compatibility of providing education to him at School B with the efficient provision of education to other pupils there. I have considered findings in fact 56 and 57, which are, so far as material in the following terms:

> "56. The child's sister, attends School A. The child's parents are very familiar with School A and the provision which is available. The child's brother, attends School B. The child's parents, knowing both schools well and having regard to the needs of the child, have concluded that School A would be the safer and more appropriate environment for the child's current behaviour to be best managed and for his academic level to be assessed at this moment in time.
>
> "57. If the child were to attend at School B the child's parents believe this would be detrimental to the hard work that has been put in with the child's older brother. …"

Finding in fact 56 again says little about the nature of the education provided at School A, and narrates that the child's parents had reached a conclusion as to the "safer and more appropriate" environment. Insofar as finding in fact 57 relates to the provision of education to other pupils at School B, it relates to only one, the child's brother. It is not couched as a finding in fact as to the FTT's own conclusion in relation to the matter, but merely as a finding that the child's parents hold a belief to a particular effect.

[31] None of this provides adequate reasons for the rejection of Mr Buggy's evidence as to the nature of the education normally provided at School A and whether it was suited to the child's age, ability and aptitude. None of it indicates that the child's father gave evidence in anything other than the most general terms as to the education normally provided at School A, or that he gave evidence as to the suitability of that education for the child, as opposed to his view that it was a safer and more appropriate environment. Some of Mr Buggy's evidence was in the form of a written statement. It included the following.

> "4. The profile of the pupils at School A typically falls into three categories. The first group of pupils (comprising around 15% of the pupils at the school) have complex physical and health needs. The pupils within this group tend to have co-morbid conditions, as well as a learning disability. These pupils are likely to be non-verbal and require 24-hour care for all personal care routines (eg washing, dressing, toileting etc).
> 5. The second group of pupils (comprising around 10% of the pupils at the school) have complex physical needs. These pupils may have conditions such as cerebral palsy, down's syndrome etc. Although the pupils in this group may not have a learning disability, they are likely to have a number of learning difficulties.

> 6. The third group of pupils (comprising around 75% of the pupils at the school) have complex learning needs. They are likely to have autism and a learning disability and often have co-morbid conditions. These pupils are likely to be non-verbal and will require significant levels of support in transition, self-help skills and personal care.
> 7. The majority of pupils at School A (around 80%) will work with Early Level of the Curriculum for Excellence for the duration of their school career, with our senior phase pupils operating at either National 1 or National 2 SQA levels. There will be pupils who receive 1:1 support from staff. These pupils will be assessed with either complex physical health needs or a complex learning disability.
> 8. The main focus for the pupils at School A is on developing the skills to be able to accept support from adults, to better understand the world and environment they live within and to live as an adult within their local community. None of our pupils will leave school fully independent and engage in employment. All will have an adult package that involves specific support to access daily living skills, specialist adult centres involving providers or specialist adult support.
> …
> 10. Based on the child's additional support needs … the support the child requires would differ from pupils at School A because all pupils within School A would appear to function and work at significantly lower developmental levels. All of the child's work would need to be prepared individually and he is unlikely to have a peer/social group to work alongside or socialise with. …
> 11. I do not therefore consider that School A is suitable for a pupil such as the child …"

[32] The FTT was, it is clear, presented with fairly detailed evidence from the head teacher at School A about the education normally provided there, and his opinion that it was not suitable for the child. The FTT required to explain why it rejected the evidence about the education normally provided there, and why, against the background of the agreed evidence as to the nature of the child's additional support needs, it rejected the opinion of the head teacher about its suitability for the child. It did not do so. According to finding in fact 29, "There are two pupils currently attending School A with profiles similar to the child." This finding might provide a basis for thinking that the FTT had given some consideration to the suitability of the education provided at School A for the child's age, ability and aptitude. It does not, however, address the question as to the education normally provided at that school, or provide any explanation of substance as to what the

FTT made of Mr Buggy's evidence. The FTT has not given adequate reasons for its conclusions regarding this particular ground of refusal.

Paragraph 3(1)(g) – provision of education at School B not suited to the ability or aptitude of the child (section 15(3)(a) of the 2000 Act)

[33] The section of the decision bearing to deal with paragraph 3(1)(g), which concerns in the provision of education contains a number of references to the education provided at School A. At page 13, the first full paragraph relates to the evidence of Mr Buggy, and concludes: "School A is well placed to address these important needs for the child."

[34] The passage already quoted from page 12 of the decision in which the FTT noted that it preferred the evidence of the child's father "in respect of where best to reintegrate the child back into school education" is in the part of the decision bearing to relate to paragraph 3(1)(g) and section 15(3)(a). In similar vein, and in an earlier passage on the same page, the FTT wrote:

> "Whilst the Tribunal acknowledges how important peers can be, we formed the view that what was most critical, at this time, was for the child to return to education. The child's father interestingly stated in his evidence that he did not consider School A to be the final placement for the child but he considered School A would be the more appropriate school to enable the child to reintegrate back into his education especially after such a long gap."

[35] It is true, as Mr Moir submitted, that the FTT in this part of its decision placed some reliance evidence that the child could not manage within "mainstream". As I have already mentioned, School B is not a special school. At page 12 of its decision, the FTT wrote:

> "The Tribunal is satisfied that the mainstream education provided by School B is not suited to the child's ability or aptitude at this time. The evidence before us is perfectly clear that mainstream education is not suitable for the child.
> Ms Joanne Findlay clearly stated that the child could not currently manage within mainstream. Ms Findlay did not agree with a placement at School A. She stressed the importance of the child having an appropriate peer group with good role models,

> similar interests and "commonalities". She prepared and drafted the transition plan for the child."

[36] Ms Findlay was the head teacher at the child's primary school. It is not disputed that she gave evidence that he could not currently manage within mainstream. The reference to her having prepared the transition plan appears to be an error – the transition plan was prepared by Fiona Brown, an educational psychologist. That error is not of itself of any great moment. There is no suggestion that the FTT was wrong to proceed on the basis that Ms Findlay, while stating that mainstream education was not suitable for the child, was of the view that the transition plan was appropriate for him.

[37] The transition plan is presented in a table format and sets out a plan for each day of the child's transition back to education in the School B over a six week period. The first day involves a meeting with the child and a youth worker gardener called Adam, and another member of staff in the family home or a neutral space. The second day involves a visit to the school, possibly after school hours, to see the support for learning areas and the garden. The plan for the third day is a visit during school hours, but avoiding breaks and lunch time, for the child to attend and do some gardening with Adam, with the potential for the child's father to stay and engage in the activity if he and the child wanted. Only in the second week would any assessment of the child's skills with a view to planning a course of work take place.

[38] In referring to some of the detail in that document I make no comment as to its merits or otherwise. It does, however, contain indications of substance that what was planned for the child, at least in the short term, was very far removed from a traditional mainstream high school teaching and learning environment. Mr Moir was correct to say that the statutory provisions recognise only schools that are special schools, and schools that

are not. It does not follow that a tribunal can properly conclude that the provision of education in a school other than a special school would not be suited to the ability or aptitude of a child without engaging with the evidence as to the nature of the education that would actually be provided at that school. There is no real discussion in the decision of the nature of the education to be provided in School B or how it related to the child's ability or aptitude.

[39] There is nothing to indicate that in expressing the view that the child would be unable to return to mainstream at present, either Ms Findlay or the author of the CYPMAP (Ms Brown) was expressing the view that the education actually proposed to be provided to the child at School B was not suited to his ability or aptitude. Indeed both Ms Findlay and Ms Brown, while having expressed the view that the child could not return to "mainstream", supported the transition plan, which was for a transition to School B.

[40] The FTT could, in principle, have accepted the evidence that the child could not return to mainstream, but rejected the evidence that the transition plan, which related to a transition to School B, was suitable for the child. Against the background of the evidence of Ms Brown and Ms Findlay, however, it was incumbent on the FTT to explain why it was doing so. In the context of this case it was important for the FTT to show that it had not conflated the suitability of education in a typical mainstream educational environment with the suitability of the education actually to be offered in School B. In my view the reasons given by the FTT are inadequate in these respects.

[41] Further, I am satisfied that the FTT in this part of their decision took into account the irrelevant matter of which facility would be the better one in which to reintegrate the child into education. The references in this part of the decision to what could be provided at

School A, rather than what would be provided at School B also demonstrate that the FTT was not addressing the correct question.

[42] There is very little to indicate what the FTT made of the evidence of Ms Brown or NC (the head teacher of School B) in relation to this matter. The appellants submitted that they had given evidence relevant to this matter, to the effect that the education provided at School B would be suited to the child's ability and aptitude, and I did not understand that to be disputed. It is difficult to discern from the FTT's decision that those witnesses gave evidence of that nature, and impossible to tell what that evidence was. The reasons given for rejecting their evidence are those narrated above, couched in terms of a preference for the child's father's evidence. I regard those as inadequate as a matter of law.

Paragraph 3(1)(g) – provision of education at School B incompatible with the provision of efficient education for the children with whom the child would be educated

[43] At finding in fact 65 and at page 13 of the decision there is a finding that placing the child at School A would not be incompatible with the provision of efficient education for the other children with whom the child would be educated. The passage at page 13 follows on another passage in which the FTT wrote:

> "Managing the child's potential to abscond, as he has in the past, will require significant staff resources to find him and persuade him to return. This will require teaching time away from other pupils. The child may, as he did in Cuiken, run around in the class while teaching is taking place and thus disrupt other pupils. Whilst many, or indeed all, of these challenges could present themselves no matter which education setting the child is placed in, the Tribunal formed to opinion that the smaller, quieter specialist provision of School A would be better placed to manage the child as he faces the extremely challenging transition of returning to education. The potential level of direct support for the child is likely to be more enhanced at School A."

[44] The FTT has again embarked on a consideration, irrelevant in the statutory context, of the provision available at School A, and the comparative merits of the two establishments as regards the transition of the child back into education. In this part of its decision the FTT did make a finding in the following terms: "In the opinion of the Tribunal the child's proposed inclusion within School B would be incompatible with the learning of the other pupils attending."

[45] I am, however, satisfied that this portion of the decision is vitiated by error of law in two respects. In the first place, as I have already observed, a significant portion of the reasoning is directed to the relative merits of the two schools, and the FTT's preference for School A. Against that background, I have no confidence that the finding regarding the compatibility of the child's inclusion in School B was the focus of the FTT's consideration in the way it ought to have been.

[46] Second there is, again, no reasoned basis presented for the rejection of the evidence of Ms Brown or Mr Chisholm, nor is there any clear indication of the evidence that they gave on this point.

Whether it was in all the circumstances appropriate to confirm the decision of the authority

[47] The FTT went on to consider whether it was in all the circumstances appropriate to confirm the decision of the appellants, and decided that it was not. Mr Moir submitted that whatever errors there might be elsewhere in the decision of the FTT, it was clear that, even if the FTT had found one of the grounds of refusal to be established, it would have refused to confirm the decision. It had considered relevant matters in determining that it was not appropriate in all the circumstances to confirm the decision.

[48] As the FTT itself noted, a tribunal should not embark on a consideration of whether it is appropriate to confirm the decision until reaching a conclusion as to whether one or more of the grounds of refusal exists. As I have already indicated, the FTT erred in law in a number of respects in its consideration as to whether such grounds existed. I am not satisfied that the FTT, approaching that first-stage consideration in the way it should have, would necessarily have reached the same conclusion. In the first place, I have held that the FTT did not give adequate reasons for some of its conclusions, and for rejecting particular parts of the evidence. Some of that evidence is likely to have been relevant to the appropriateness of confirming the decision.

[49] In the second place, I observe that a tribunal would not normally be embarking on a consideration of whether it was appropriate in all the circumstances to confirm a decision unless it had concluded that one or more of the grounds of refusal existed. It would be undertaking that consideration in the light of a conclusion that one or more grounds did exist, and would be looking at "appropriateness" against that background. I do not know what conclusions a tribunal properly directing itself would have reached in relation to any or all of the grounds of refusal at issue in this case, far less as to the appropriateness of confirming the decision, had any of those grounds been established.

Other matters

[50] The conclusions I have already expressed are sufficient for the disposal of the case. I record briefly other matters raised by the appellant and my views in relation to them.

[51] The appellants contended that the FTT had misdirected itself by taking into account the inability of School B to meet the child's personal care needs. Parties agreed that the reference to personal care needs came from the CYPMAP dated May 2018, which included a

statement that he needed support with the majority of his everyday self-care skills such as showering, cleaning his teeth, and organising his clothes and belongings. Those were needs that would tend to arise in the home environment rather than at school. I observe that it is not clear, in the absence of further explanation by the FTT, why those particular self-care needs were relevant in the sense that they would arise during the school day.

[52] The appellants made particular contentions that the FTT had left out of account evidence given by Mr Buggy about the nature of the peer group available to the child at School A. This was, they said, potentially important because it had been agreed in the Joint Minute in the reference that the child needed an educational setting that would support him to re-integrate with his peers, and that he would benefit from access to similar peers. The appellants had produced their own transcript of Mr Buggy's evidence. It was not a certified transcript, and the respondents said they were not in a position to agree that it was accurate. It had been produced late in the day, and they did not have legal aid to listen to the recording and check the accuracy of the transcript.

[53] I have not relied on any part of the transcript of Mr Buggy's evidence in making the decision to allow this appeal. The production of transcripts of evidence in tribunal appeals of this sort is unusual and is undesirable. It is a time consuming and expensive process. It should not be necessary if the FTT records in the decision the oral evidence relevant to matters of controversy.

[54] The FTT recorded that Mr Buggy had given evidence that there were two pupils with similar profiles to the child's at School A. It was the position of the appellants that Mr Buggy's evidence was that those pupils were in S4 or S5 and S6, and therefore significantly older than the child. He said they found being at School A very difficult. The profile of pupils at School A had changed with newer pupils having complex learning

needs. Those with mild or moderate learning disabilities were at the senior end of the School And about to leave.

[55] On the assumption that the availability of a peer group for the child was important in the case, that evidence, if it was given as it is recorded in the transcript, is of potential significance, and it would be important to know what the FTT made of it. Evidence about the profile of the pupils might also be relevant to determining what was the education normally offered at School A.

[56] The appellants also complained that the FTT had left out of account Ms Brown's explanation, also transcribed, regarding the inclusion of the child's father as being actively involved in some of the transition plan. The FTT had laid some emphasis on his involvement as demonstrating the unsuitability of School B. This, much shorter, passage of transcription I did not understand to be disputed. Mr Moir accepted its accuracy, subject to the caveat that it involved "cherry picking" from the whole of the witness's evidence. Ms Brown had given evidence that the child's father's involvement was optional and need not be extensive, and that the purpose of involving him was to allow him to get to know the staff who would be working with the child, with a view to the child's father coming to trust them. I have already found that the reasons given by the FTT for rejecting Ms Brown's evidence were not adequate, and that they did not demonstrate any real engagement with the terms of the transition plan. I observe that, as the FTT appears to have regarded the extent of the child's father's proposed involvement in the plan as significant in determining whether the education provided at School B was suitable, it should have made it clear what it made of this passage of Ms Brown's evidence.

Failure to give adequate reasons – further observations

[57] I am conscious that tribunals need to provide reasonably concise and understandable decisions, and with that in mind, make the following additional observations in the context of this case.

[58] The FTT in this case wrote:

> "It is not practical, appropriate or necessary to narrate every aspect of the evidence in this written decision. We note that many of the witnesses lodged written mini-CVs to assist the Tribunal. We also were provided with written statements which were entered into evidence. "
>
> and
>
> "We do not seek to rehearse all the evidence before us. The Findings of Fact record the evidence we accepted."

[59] Fact-finding tribunals, such as the FTT is in a case of this sort, are under no obligation to narrate all of the evidence led before them, or to narrate in detail all of the evidence they rejected. There is no merit in a mechanistic recital of all of the evidence, and that sort of exercise should be avoided. The FTT does require to bear in mind, however, that the audience for a decision includes not only parties who were present at the hearing, but also, potentially, an appellate tribunal. The FTT's decision is the primary source of information for the appellate tribunal as to what the oral evidence was. It is also important more generally that a reader unconnected with the case should be able to understand why the decision was made. Anonymised decisions in cases of this type may be published. It is an aspect of open justice that members of the public should be able to see and understand the decisions of tribunals. The provision of comprehensible written reasons contributes to the maintenance of public confidence in the decision making process: *Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board* 2005 SLT 315, paragraph 63.

[60] As I observed in the decision relating to permission to appeal in this case, findings in fact are expressions of a conclusion as to a matter of fact, formed on the basis of evidence. Some of the findings in fact in this case conform to that model. Some, however, include narrations of evidence. A number read "[name of witness] stated …". Some include discussions of the law. Finding in fact 25, for example, is in these terms:

> "The burden of proof in this placing request rests with the Authority. The appeal hearing is a full reconsideration of the evidence and it is the current circumstances that apply at the date of the hearing that are relevant."

Others record findings in fact and law, rather than matters of fact, for example:

> "The child has additional support needs in terms of section 1 of [the 2004 Act]"

The way in which the findings in fact in this case have been written means that they are less useful that the FTT must have intended in providing an indication as to the evidence that was accepted. In relation to an issue essential to the decision-making process of the tribunal, a decision should set out intelligibly the findings of fact relevant to that matter. Elsewhere in the decision a tribunal should make clear what evidence those findings were based on. Where there has been evidence to contrary effect, the decision should set out also what that evidence was, and why the competing bodies of evidence have, respectively, been accepted and rejected. The FTT should do so as concisely as is consistent with the nature and extent of the evidence in question.

[61] I have already referred to a finding in fact which expressed conclusions about mixed questions of fact and law. Another example is this:

> "School A is suited to the ability and aptitude of the child".

I observe that the FTT should have been considering whether it was satisfied that the education normally provided at School A was *not* suited to the child's age, ability or

aptitude. Ideally, findings in fact relevant to an issue of this sort would be factual findings as to the education normally provided at School A, and about the child's ability and his aptitude (and age, if that were a live issue). The reasons for the decision would then go on to explain what those factual findings demonstrated about the suitability or otherwise of that education for the child's age, ability and aptitude.

[62] The reader ought to be able to discern how the evidence related to the facts found, and how the facts found have been employed in considering whether the legal tests have been satisfied. A rigorous focus on the matters of fact relevant to each of the legal tests individually will be helpful in this regard.

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within ***30 days*** *of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*