Upper Tribunal confirms appeals can be brought against review decisions of the SEN Tribunal for Wales

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Matthew Wyard succeeds in important Upper Tribunal appeal confirming that appeals can be brought against review decisions of the Special Educational Needs Tribunal for Wales

The Upper Tribunal published yesterday, on 1 August, its decision in AB v Newport City Council [2022] UKUT 190 (AAC).

This appeal concerned a decision by the Special Educational Needs Tribunal for Wales ("SENTW") to uphold Newport City Council's decision to cease to maintain S's Statement of Special Educational Needs ("SSEN").

S sought a review of SENTW's decision which was refused.

S appealed to the UT against SENTW's decision and, due to being in time, also against the review decision.

The grounds of challenge in respect of the review decision are ultimately immaterial; S prime target of the challenge against the review decision was the long-held assumption by practitioners that one cannot appeal a SENTW review decision to the UT.

The crux of S's case was that it was correct that in England an appeal against a review decision is prohibited under s9-11 of the Tribunals Courts and Enforcement Act 2007. However, s11 TCEA 2007 was not applicable in Wales as s336ZB(3) of the Education Act 1996 (which applies the provisions of the TCEA 2007 to the Welsh regime) did not specifically transpose s11 TCEA 2007 into the Welsh system. Accordingly, there was no such prohibition against appealing a review decision made by SENTW to the UT.

The UT agreed at [61] of its decision that *"Section 336ZB(3) provides a right of appeal to the Upper Tribunal against a [SENTW] review decision"* albeit a warning was issued to practitioners at [65] that:

> *"in most cases the Upper Tribunal would probably refuse permission to appeal because the challenge is premature or of no substance. What really matters is the appeal decision itself and parties should recognise this. Pointless challenges to review decisions are likely to amount to a breach of a party's obligation [to help the UT further the overriding objective]"*

There were also two grounds of challenge to SENTW's substantive decision, both of which were allowed on appeal.

The first ground was that SENTW had failed to take into account the principle from W v Gloucestershire County Council [2001] EWHC Admin 481 that SENTW (or the First Tier Tribunal) should take into account educational disruption associated with ceasing a Statement and, on the facts of this case, S having to move from an independent school back into a maintained school. Finding in the Appellant's favour the UT explained at [81]-[84] that:

> *"82. The Tribunal's reasons do not address S's ability to cope with transition to Newport's sixth form arrangements although the issue was raised in parental argument. The Tribunal may have thought that, were the appeal to fail, S would remain at W School so that (a) transfer/disruption considerations did not arise; and (b) all that was required was a notional analysis of whether Newport's sixth-form arrangements would satisfactorily meet S's special educational needs.*
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> *83. Turning now to W v Gloucestershire. In my judicial experience, this was not a typical transition case. Transition issues tend to arise where a local authority decides to cease to maintain a statement or review a statement and name a different school in Part 4. W was an appeal against a refusal to name the independent school currently attended by a child. However, that does not render the decision inapplicable in cessation cases. So far as a child's needs are concerned, the cause of educational disruption does not really matter. In my judgment, the ratio of W v Gloucestershire is applicable in cessation cases. As a decision of the High Court in a jurisdiction now exercisable by the Upper*

Tribunal, I should follow it unless satisfied there is a good reason not to (Secretary of State for Justice v RB [2010] UKUT 454 (AAC)). I am not so satisfied. Indeed, Mr Jowett, for the local authority, did not argue that, as a matter of law, W was inapplicable in cessation cases.

84. The relevant considerations before the Tribunal included the educational difficulties that S might face on a transfer to Newport's sixth form arrangements (W v Gloucestershire, paragraph 21). Whether or not the Tribunal rightly excluded the appropriateness of W School, this remained a relevant consideration. If the Tribunal thought transition issues did not arise because, whatever the result, S would remain at W School, its reasons should have said so. If the Tribunal thought that S would cope with transfer without material educational difficulty, it should again have said so. These deficiencies left the Appellant unable to understand why her case failed, and therefore rendered the Tribunal's reasons inadequate. Alternatively, if the Tribunal thought transition was irrelevant on a cessation appeal, it misdirected itself in law. Permission to appeal is granted on ground 3 and the ground succeeds."

The second ground of appeal against the substantive decision was that the Tribunal, in finding that S's needs could be met within maintained provision in Newport's area erred as there was no evidence before SENTW that a suitable alternative was available. This was on the basis that under Newport's typical arrangements children have to travel across multiple sites which S could not do. Finding in the Appellant's favour the UT noted at [86]:

"86. Since this appeal succeeds on ground 3, I shall deal with ground 4 briefly. The Tribunal dealt with the argument that S's needs called for a smaller educational environment with small classes. The reasons did not deal with S's ability to travel between Newport sites by bus. The parental argument was not fanciful. The undisputed evidence was that S experienced anxiety and social communication difficulties. In failing to explain why this aspect of the parental case was not dealt with, the Tribunal gave inadequate reasons for its decision. Permission to appeal is granted on ground 4 and the ground succeeds."

As well as giving judgment, the UT made eight comments criticising Newport's conduct of the appeal generally at [89(a)-(h)]. These will give food for thought to local authorities on best practice (or at least how not to conduct itself). The author's view is that these are equally applicable to England, as well as Wales:

> *"89. I wish to conclude with some remarks about the local authority's conduct in this case. While these were not the subject of argument, it may assist the authority in its management of other statements of SEN if I set them out:*
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> *(a) if a local authority intends to cease to maintain a child's statement in the final year of compulsory schooling, and the child wishes to proceed to sixth form studies at the school named in Part 4 of a statement, the decision needs to be timed to suit the interests of the child, not the authority. Children and parents need a reasonable opportunity to adjust. In this case, the local authority gave S's parents a notice of 'de-statement' during the summer holidays, only two weeks before S intended to return to W School to begin sixth form studies;*
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> *(b) the difficulties that S's parents must have faced due to the late notice of 'destatement' must have been compounded by mixed messages about the authority's intentions. On the same date as the notice of 'de-statement', they also issued an amended statement. Not only did this continue to name W School, it also recorded parental comments of August 2019 about S's classroom support needs. Since S's parents were not commenting on her summer holiday support needs, it must have been obvious these comments related to sixth form support needs. The amended statement said nothing about A-Level studies nor transition arrangements. This cannot be explained by an authority's duty to maintain a statement pending determination of an appeal. In this case, the authority initially denied a duty to maintain S's statement, a stance that only seems to have altered once S's parents had threatened to bring judicial review proceedings;*
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> *(c) the local authority criticised S's parents for not keeping them appraised of plans for S's sixth form education. Evidential support for this assertion is elusive. Events were set in train in June 2019 when the parents requested transfer to another independent school. It is not*

clear why, but the authority's response was that S's needs did not justify placement at any independent school. During July 2019, S's parents tried to persuade the authority to reconsider and, in tandem, sought amendments to S's statement. In these circumstances, it was surely obvious that, at least until the notice of 'de-statement' on 21 August 2019, the intention was for S to remain at W School. In any event, the local authority could have simply asked S's parents about their plans if W School ceased to be an option;

(d) the authority consistently described W School as a "private school" placement. There is no such thing as a 'private school' under EA 1996; the correct term is "independent school". Repeated use of the term 'private school', rather than 'independent school', is not helpful. It runs the risk of obscuring the child's needs beneath a debate as to whether parents are merely seeking a 'privileged' education, which was in fact argued by the present authority in its case statement. I also do not understand why the authority's written Tribunal submissions described S as "a young lady" rather than a child or a young person;

(e) my judicial experience is that parental emotions often run high when seeking particular special educational provision for their child. I think any parent, especially one whose child's needs make her more vulnerable, can understand why. In my experience, local authority education officials also understand this and, accordingly, tend to exhibit due sensitivity in their dealings with parents. I was therefore shocked to read the local authority's assertion, in their case statement that "the parental request is based on the prestige of attending a private school placement". The basis for this was that S's parents failed to provide information about the benefits of W School. Apart from this assertion being arguably unsupported by any evidence, it risked goading the parents away from focussing on S's needs. To S's parents' credit that they did not rise to this bait nor to the assertion that their arguments discredited staff at W School . No matter how sensitively proceedings are managed by tribunals, the experience must remain a difficult and stressful one for parents. It is in no one's interests for a local authority to make matters more trying by impugning a parent's motives. A local authority is entitled to disagree with parental preference but must not lose sight of the fact that the process has a single focus - a child's needs;

(f) the authority argued that S's parents provided no information about the benefits of W School. This is difficult to understand because, for at least five years, the authority had funded S's placement there. It was named in Part 4 of her statement, and the authority were therefore expected to monitor its continued appropriateness. Moreover, an interim Statement review report of 5 June 2019 (page 309) described how W School might support S in her sixth form studies. While it may take some time for local authority officials to interrogate a statemented child's case file for the purposes of tribunal proceedings, the task cannot be avoided. If done without sufficient care, there is a real risk of a local authority misleading a tribunal;

(g) the authority's understanding of their duties under the EA 1996 was deficient. Their case statement argued that, had they known S would be enrolled at W School's sixth form, they would have maintained her statement in order to continue her 10 hours of additional weekly support. The authority also said they would "re-activate" S's statement pending determination of the appeal but not pay her fees since W School was not a "specialist school". The authority seemed to assume that they could pick and choose which parts of S's statement to fund (refuse to fund a W School placement, despite it being named in Part 4, but continue to fund Part 3 support costs at the school). The authority further asserted that, even without a statement, W School had direct obligations to support S under Welsh School Action Plus arrangements even though it was both an independent school and in England;

(h) the authority gave multiple reasons, at different times, for ceasing to maintain S's statement some of which were clearly invalid. The notice of 'de-statement' said the statement had to end because S had completed secondary schooling. This overlooked that, for the purposes of Part IV of EA 1996, a "child" includes "any person who has not attained the age of 19 and is a registered pupil at a school" (section 312(5)). Another reason was that S would not be attending a special school, an assertion without any legislative basis. A further reason was that children in further education could not have statements of SEN, but the parents wanted S to remain at a school, not a Sixth form college, and the authority's case was that she could attend a Sixth form attached to a maintained secondary school (i.e. not further education). The fourth unsound reason was that the Statement ceased because "no confirmation was received by Parents of an application being made

to a Newport School" (email dated 23 October 2019, page 550). In other words, S could keep her statement but only if her parents agreed to abandon her education at W School. All this could be suggestive of a local authority that did not know what it was doing. Whether or not that is fair, advancing five separate reasons (the above plus the, in principle, legitimate reason that S's needs could be met without a statement) for ceasing to maintain S's statement must have made it far more difficult for S's parents than it should have been to mount an appeal against the authority's decision."

A copy of the decision is available here.

Matthew Wyard appeared for the successful Appellant instructed by Christopher McFarland and Adam Mercer of Sinclairslaw.

AB v Newport City Council represents Matthew's third success in the Upper Tribunal this year. As well as this appeal, he has successfully secured the refusal of permission through written representations and representation at an oral permission hearing.

To instruct Matthew in an Upper Tribunal or judicial review matter please contact his clerks Chris Mitchell, Tom Cox or Gemma Faulkner on education@3pb.co.uk

2 August 2022

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