IN THE UPPER TRIBUNAL **Case No HS/2846/2010**
ADMINISTRATIVE APPEALS CHAMBER

Before His Honour Judge David Pearl
Sitting as a Judge of the Upper Tribunal

Attendances:

For the Appellant. **Mr D Wolfe of Counsel**
For the Respondent. **Ms F Scolding of Counsel**

Decision: The appeal is allowed. The decision of the First-tier Tribunal is quashed. The case is remitted to the First-tier Tribunal (Health Education and Social Care Chamber) (SEN) for rehearing before a differently constituted tribunal.

REASONS FOR DECISION

Introduction

1. This case concerns the special educational provisions for C, who was born on 3rd February 1998 and who is the daughter of the Appellants. The Statement which is under challenge was amended ahead of C's transfer to secondary school in September 2010.
2. Part 2 of the Statement describes the background which I set out at the outset of this Judgement, because, in the context of detailed and sophisticated legal submissions by both Counsel, it is all too easy to lose sight of the real needs of C.

   > "C's range of special educational needs are very complex. She has physical and learning limitations. C has cerebral palsy that affects all four limbs and all that this condition entails. Her right side is weaker than her left. C suffers from epilepsy and has a significant complex visual impairment. C is registered as sight impaired (partially sighted). C has scoliosis of the dorso lumbar spine…"
3. Part 4 of the Statement states that as from September 2010, when C transfers to secondary school, she will attend Meadow High School, a LA maintained special day school.
4. The parents appealed to the First-tier Tribunal, the primary basis for the appeal being that St Mary's School, Bexhill, their preferred school, should have been named in Part 4. St Mary's School is a residential school that provides a waking day curriculum
5. The appeal was dismissed by the First-tier Tribunal in a decision dated 28th September (Judge Askham, Mr Lucas, Ms Boyle) and it is from that decision that an appeal to the Upper Tribunal has been lodged. Judge Saffer, in a decision dated 5th November 2010, refused to review the decision or to grant permission to appeal. I granted permission by Order dated 17th December 2010 on all three grounds of challenge.
6. The three grounds are as follows:

(a) there was an unlawful failure by the Tribunal to consider wider benefits in deciding whether additional public expenditure would be unreasonable.
(b) the First-tier Tribunal made an unlawful decision in that C should be placed out of her correct year group when there was no evidence to support that and that this was directed simply in order to make suitable a placement that would otherwise be unsuitable.
(c) there was an unlawful failure to consider whether Meadow High School could in fact make the speech and language therapy which C requires.

The first Ground.

7. It is submitted by Mr Wolfe that when the First-tier Tribunal assessed the costs involved in sending C to the respective schools, it failed to consider (as part of an evaluation under Education Act 1996 s 9) the wider benefits which placement at St Mary's would bring, and likewise failed to consider the additional costs which would be involved if C attended Meadow High School.
8. Section 9 of the Education Act 1996 was amended by SI 2010/1158, and reads as follows:

> "In exercising or performing all their respective powers and duties under the Education Act, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure".

9. The amendment came into force on May 10th 2010, and therefore it is that provision that was applicable at the time of the hearing before the First-tier Tribunal.
10. Sch 27 para 3(3) which applies solely to the maintained sector, has also been amended. This states:

> "Where a local authority make a statement in a case where the parent of the child concerned has expressed a preference in pursuance of such arrangements as to the school at which he wishes to be educated to be provided for his child, they shall specify the name of that school in the statement unless –
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> (a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or
> (b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources."

11. The amendment to s 322(1) states:

> "Where it appears to a local authority that another local authority, a Local Health Board or a Primary Care Trust could, by taking any specified action, help in the exercise of any of their

> functions under this Part, they may request the help of the board, authority or trust, specifying the action in question".

12. The interrelationship between these provisions was best expressed by Sedley LJ in *C v Buckinghamshire County Council and SENDIST [1999] ELR 179*, when he said:

> "The global effect…is that in special educational needs cases a duly expressed parental preference for a state-sector school is binding in the absence of a disqualifying factor, while an expressed preference for an independent school is to be considered, together with the reasons for it, in the light of the principle enunciated in s 9".

13. In this case, we are concerned with s 9 alone.
14. The Tribunal said (at para 56) "we have no jurisdiction to deal with social and health reasons however compelling they may be." It is that sentence which Mr Wolfe submits constitutes an error of law.
15. As Ms Scolding on behalf of the Respondent conceded at the hearing before me, her written submissions drawing a distinction between a "local education authority" and other functions of the local authority (social services, housing, etc) is no longer a distinction that carries with it the force of the legislative provisions.
16. Mr Wolfe is correct in his submission that since May 2010, both s 9 and Sch 27 para 3(3) specifically refer to the "local authority" and there is no distinction in the legislation between the education functions of the local authority and the other functions of the local authority.
17. Notwithstanding this concession, however, Ms Scolding maintains the submission that s 9 and Schedule 27 deal with the Education Act and educational provision, and the exercise that faces a LA (and a Tribunal on appeal) is the balance between educational advantages versus additional cost. In looking at that additional cost, Ms Scolding submits that the approach that should be adopted must exclude consideration of social and health provision. She states also that there is different funding provision for education and social services, and that social services, for example, have no independent right to be represented before a tribunal.
18. I have given very careful attention to the authorities that have been cited to me. Mr Wolfe relies on the case of *O v London Borough of Lewisham (Andrew Nicol QC sitting as a Deputy High Court Judge) [2007] EWHC 2130 (Admin).* Ms Scolding's primary submission on this case is that it is wrongly decided.
19. Given the approach taken by Counsel on this case, it is important that I deal with it in detail. The First-tier Tribunal said, at para 48, that it had specifically considered this decision, as well as *Oxfordshire County Council v GB [2001] EWCA Civ 1358* and *Slough Borough Council v SENDIST and others [2010] EWCA Civ 668.* The lead judgements in both those Court of Appeal cases were given by Sedley LJ.
20. The Schools that were in issue in *O* were both maintained special schools, and thus Schedule 27 paragraph 3 was the primary provision that governed the dispute, although s 9 was of course also relevant. The Tribunal in that case found that the school of parental preference, which involved a residential setting, was over provision and an inefficient use of resources. Andrew Nicol QC, having looked with considerable care at all of the authorities, said that the LEA's and the Tribunal "should inform themselves of the 'full picture' and adopt a 'holistic approach.' He

considered that this was the natural meaning of the term 'public expenditure' in s 9, namely it is concerned with the impact of a parent's choice on the public purse generally and not exclusively with the cost of the local education authority. Andrew Nicol QC accepted the argument advanced before him by Mr Wolfe in that case that for the Tribunal (or the LA) to take account of savings to the LA's social services budget does not require the Tribunal or the LA to go beyond the legislative framework. Having referred to the practical difficulties which might follow if the term 'public expenditure' was given the meaning for which Mr Wolfe contended, The Judge went on to specifically say as follows:

> 40. In my judgment these are not factors which alter the outcome of the exercise of statutory interpretation. Although the Tribunal's focus is a child's educational needs, his or her non-educational requirements are not concepts which are alien to it. The Tribunal may have to grapple with these for the purpose of deciding what should be included in Parts III and IV of the statement. And, as the Court of Appeal said in the *Leeds City Council* [2005] *EWCA Civ 988* case, as far as possible and consistently with the legislative framework it is desirable that a Tribunal inform itself of the 'full picture' and adopt a 'holistic approach'. As for possible change in circumstances, this is inherent in the system already. Mr Wolfe gave the example of transport expenses. In deciding whether the parents' choice would involve an inefficient use of resources, the Tribunal must take account of only the marginal cost of providing transport to the alternative schools – see, for instance, *Oxfordshire County Council v GB* [2001] *EWCA Civ 1358* at para [18]. The marginal cost would be nil if the LEA had to provide transport for other children in any case and if the car, bus or taxi could take an additional child without further expense. However, the position would be liable to change if those other children no longer needed the transportation. The possibility that the calculus of expenditure and savings may change is not a good reason for the Tribunal doing the best it can to assess the position at the date of the hearing.
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> 41.Accordingly, I respectfully differ from the conclusion which Sir Richard Tucker reached in the *Somerset* case [*S v Somerset County Council [2002] EWHC 1808 (Admin)]*. In my judgment, the term 'public expenditure' in s.9 is not confined to the expenditure of the Local Education Authority. Mr Wolfe referred me to the decision of the Court of Appeal on 12th February 2003 in *Helen S v Somerset Council* [2003] EWCA Civ 195. I observed that this was a refusal of permission to appeal and, as such, was not something which should ordinarily be cited. I had not appreciated at the time that it was a refusal of permission to appeal from Sir Richard Tucker's decision in the same case. As such, it is right to note that Sedley LJ considered that it remained an 'open question' as to whether the term 'public expenditure' in s.9 was confined to the education budget of the LEA in question. Permission to appeal was refused because on the facts of that case, the Court of Appeal considered that, even if the Tribunal had taken into account the social services' costs savings involved by choosing the parent's preferred school, the decision would have inexorably have been the same given the Tribunal's views about the relative educational advantage of the two competing candidate schools.

21. I have arrived at a similar view to the one arrived at by Andrew Nicol QC, and for the same reasons as those expressed by Andrew Nicol QC I respectfully differ from the narrower conclusion reached by Sir Richard Tucker in *Somerset* and the similar conclusion reached by Dyson J in *C v SEN Tribunal (1997) ELR 390.*

22. Andrew Nicol QC referred in *O* to the legislative changes which had been made at that time, in particular in the Children Act 2004. Whilst Andrew

Nicol QC accepted the arguments made by Counsel for the Lewisham Borough Council in that case that Parliament had maintained a distinction between the functions of a LEA and a social services authority, he did not accept that this distinction is sufficient to undermine the more general point that the legislative changes which had already been made, reflected the 'good sense of looking at the totality of the child's position under the alternatives being canvassed.' The changes of course have moved much further as a result of the amendments in 2010, and thus Andrew Nicol QC's conclusions have even more force today.

23. Andrew Nicol QC referred to Court of Appeal decision in *R v Leeds City Council and SENDIST [2005] EWCA Civ 988.* In that case, Wall LJ said the following:

> [50] ….Because of his condition, C is manifestly a child with multiple needs who poses enormous challenges for those who have to attempt to care for him and provide him with education. Such a child's educational needs simply cannot be viewed in isolation; nor can his section 17 [a reference to s.17 of the Children Act 1989] needs; nor, for that matter, can his need for services provided by the Health Authority and CAMHS. A holistic approach is necessary, and with inter-agency co-operation, essential, particularly since two of the bodies with statutory responsibilities for (the LEA and SSD) are part of the same local authority.
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> [51] At the same time, of course, the Tribunal is a creature of statute, and its powers are limited to the areas of responsibility given to it by the Education Act 1996 and the consequential regulations…In a case, such as the present, the Tribunal, in my judgment, had to tread a delicate line between properly informing itself of the 'full picture' relating to C, and limiting its decision to a careful assessment of C's special educational needs within that full picture….'

24. I agree absolutely with what is said by Andrew Nicol QC about this case. He said that LA's and the Tribunal should inform themselves of what Wall LJ refers to as the 'full picture' and to adopt a 'holistic approach' and that this accords with the natural meaning of the term 'public expenditure' in s 9, and I should add also, in my view, with the phrase 'efficient use of resources' in Schedule 27.

25. Ms Scolding urged me to reject the reasoning in *O*, on the grounds that it conflicts not only with the *C* case and the *Somerset* case, but also that it is inconsistent with the House of Lords decision in *B v London Borough of Harrow [2000] ELR 109*, which is of course binding on me.

26. Lord Slynn of Hadley said:

> "I do not consider that s 9 of the Act means that parental preference is to prevail unless it involves unreasonable public expenditure. In dealing with special schools, the authority must also observe the specific provisions of Sch 27, para 3(3). This does not mean that the parent loses the right to express a preference. A preference may be expressed but it is subject to the qualifications set out in para 3(3), one of which is the efficient use of resources. – in my opinion, the responsible local education authority's resources. It may be as a result that a child seeking to go to a special school out of his own local education authority's area may have more difficulty in doing so than a child seeking to go to another school. But that is what, in my view, Parliament has clearly provided."

27. Andrew Nicol QC decided that he did not consider that the House of Lords' interpretation of the word 'resources' in para 3(3) requires an interpretation of s 9 which confines 'expenditure' not only to 'public'

expenditure, but also to expenditure by the LEA. I agree with him. I have arrived at the conclusion that the legislation, as now further amended in 2010, enables and indeed obliges the LA and the Tribunal on appeal to look at the public purse generally, and not exclusively with the costs that fall on the education budget.

28. Of the many recent cases in this area, in addition to *O*, the other decision that seems to me to provide the most valuable assistance is that of Stadlen J in *Hampshire County Council v R and SENDIST [2009] EWHC 629 (Admin).* It is not necessary for the purposes of this case to set out the facts of that case in any detail. Suffice it to say that Stadlen J was concerned, as here, with the meaning of s 9. He said:

> [35]… In my judgment the policy behind section 9 is that there are limiting factors on an unbridled regard being paid to the general principle that pupils are to be educated in accordance with the wishes of their parents, and those limiting factors are inserted by Parliament by reference to the knock-on effect that giving effect to those wishes might have generally.
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> [36]It may be that having regard to the parents' parental wishes would be incompatible with the provision of efficient instruction and training to the parents' own child or children. It may be that it would be incompatible with the provision of efficient instruction and training for children with whom the parents' children would be educated if the wishes were to be given effect to. It may be that it would be incompatible with the provision of efficient instruction and training to other children who would not be educated together with the pupils of the parents in question, but who would be adversely affected, because the efficiency of their instruction and training would be incompatible with the parental wishes, in some indirect way, by reason of the arrangements that would need to be made to give effect to those wishes.

29. In other words, one looks at the total picture. Applying this general principle, it is my view that a LA (and the Tribunal on appeal) when conducting the balancing exercise, are obliged to take account of wider social and health benefits when deciding whether additional public expenditure is unreasonable. I do not consider that my approach is different from that as set out by the Upper Tribunal in *Hampshire County Council v JP [2009] UKUT 239* which decided that the decision of the Tribunal in that case was flawed in that it gave inadequate reasons for its conclusion that the child in that case required residential education. That case was not concerned with, and did not consider, s 9.

30. Accordingly, on this Ground, I have decided that the Tribunal misdirected itself in law. It should have taken account of the wider benefits, which were indeed referred to by the Tribunal when deciding whether the extra public expenditure that would be incurred if St Mary's were identified as the School in Part 4, would or would not be 'unreasonable' on the facts of this case.

31. I should emphasise that the misdirection is in no way related to whether the Tribunal should have made a value judgement on the 'respite' package that C would receive if she were placed at the day school. As Mr Wolfe, in my view correctly, observed, there is no dispute in this case about the respite package, and those matters do not form the basis of the appeal in this case. The issue is solely concerned with whether the wider benefits in attending St Mary's should or should not have been addressed, and it is my judgement that they should have addressed.

32. I have been referred by Mr Wolfe to the Witness Statement of Ms Jane McConnell, Chief Executive of IPSEA, dated 31st January 2011, which, in the exercise of my discretion, I have admitted in as evidence in this case. I quote here, from paragraph 12 of her Statement. These remarks confirm me in my view that my approach to s 9 (as indeed to Schedule 27) is the correct one. She says:

> "For all children with a statement it is our experience that any attempt to silo their educational needs from their social care needs or medical needs often prove impossible. For example, to attempt to isolate when learning is an educational need and when learning is a social need is a false exercise. This is particularly so for children with special educational needs who often have not progressed through the basic learning milestones that an ordinary developing child would have achieved before starting formal education, such as basic speech and language development, behaviour and social interaction. It is therefore almost impossible for this group of children to separate, predict and assess the benefits that arise directly only in relation to formal educational needs as opposed to care needs. In many cases it is a false exercise to attempt to do so as, like with younger ordinarily developing children, they need to learn continually whilst awake. What is different however is that in order to make progress this has to happen in a more planned, structured and formalised way. To consider the wider benefits of a particular school placement is therefore essential when considering the special educational needs of a child".

33. When conducting the exercise under s 9, the Tribunal should have taken account of the broader calculus, and in consequence, the decision of the Tribunal is set aside, and the matter must be reconsidered by a freshly constituted panel.

34. Given that I concluded that it is right to set aside the decision on the basis of the first ground of appeal, it is not strictly necessary for me to consider the other two grounds. However, in order to be of assistance to the new panel, it may be helpful if I make the following observations.

Grounds two and three

35. Ground two is developed by Mr Wolfe as follows: "The Appellants say that the First-tier Tribunal acted unlawfully in deciding first that their daughter should be placed at Meadow High and then second deciding that what would otherwise (on their own finding) be an unsuitable placement should be made suitable by her being placed a year below her chronological age (without even that being reflected, as it needed to be, in an amendment to Part 3)."

36. I have to say that there is force in Mr Wolfe's submission that a reading of the Tribunal's decision gives the impression that the Tribunal are making the provision fit the placement, rather than first, deciding what provision is required and specifying it in Part 3, and then, secondly, going on to decide at which school that provision is to be made. When the matter returns to the First-tier Tribunal, no doubt the newly constituted tribunal will bear in mind that it must decide first, the defined needs set out in Part 2, then what special educational provision is required for C, and make it absolutely clear by specifying this in Part 3. Only then, can the Tribunal turn to Part 4. [*S v Swansea [200] ELR 315:* "Whilst the contents of Part 3 of the Statement must not be dictated by a prior decision as to placement in part 4 (that would put the cart before the horse]".

37. So far as Ground three is concerned, I have to say that this is not a ground upon which I would have set the decision below aside. As Ms Scolding submitted, this ground amounts really to no more than a complaint. The Tribunal heard the evidence and it reached sustainable conclusions. In particular, the Tribunal took account of the evidence presented to it by Mrs Harland, the speech and language specialist, and explained fully and carefully what aspects of her evidence they accepted and what aspects they rejected.

38. In *F Primary School v Mr and Mrs T and SENDIST [2006] EWHC 1250 (Admin)*, Mr James Goudie QC said:

> "The decision of a Tribunal is not required to be an elaborate, formalistic product of refined legal draftsmanship. It must contain an outline of the story which has given rise to the complaint, a summary of the Tribunal's basic factual conclusions, and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be a sufficient account of the facts and of the reasoning to enable an appeal court to see whether any question of law arises. A Tribunal's reasons are not, however, intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law. Their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or (as the case may be) win. These reasons should not be subjected to a detailed analysis. That is to misuse the purpose for which the reasons are given."

39. I have made much the same point in recent cases in this field in which I have been involved, for example *FC v Suffolk CC [2011] ELR 45*. (see also the decision of Judge Wikely in *DC v London Borough of Ealing [2010] UKUT 10 (AAC)*].

40. But for the reasons as set out above, I am persuaded by Mr Wolfe that his submissions on Ground 1 are correct and I accordingly set the decision of the First-tier Tribunal aside, and remit the matter to be determined by a freshly constituted panel.

His Honour Judge David Pearl
Sitting as a Judge of the Upper Tribunal
February 11th 2011