The SENDIST extended appeals jurisdiction

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(What happens when the recommendations are rejected?)

There has been little case law arising from the new extended jurisdiction. During the National Trial, none at all, although the judicial lead at the time, for the Tribunal, His Honour Judge Simon Oliver, reported that of the limited recommendations, virtually all health recommendations were rejected. Nonetheless, no applications were made either to the courts or by way of a complaint. In relation to the extended jurisdiction, as it now is, there have recently been two cases involving the refusal of local authorities to implement the Tribunal's recommendations. The first is The Queen on the Application of AT and BT by their Litigation Friend CT v The London Borough of Barnet (2019) EWHC 3404 (Admin) Phillip Mott K.C. sitting as a deputy judge at the High Court. More recently, Mr Justice Freedman, in The King on the Application of LS v The London Borough of Merton and the Residential School (2024) EWHC 584 (Admin). Further, in the Upper Tribunal, in another very recent case, MM as an Alternative Person for C Appellant v Royal Borough of Greenwich (2024) UKUT 179 (AAC) Upper Tribunal Judge Stout, considered a slightly different point, (among a number of other important issues) namely where the Tribunal decided it was unable to make recommendations in respect of health and social care.

In the most recent case, when the application for judicial review was made in the Merton case, which included an application for an urgent hearing, Mrs Justice Foster ordered that the case of LS v London Borough of Merton supra, be decided by a High Court Judge, and not therefore a deputy judge of the High Court. It therefore appears that Mr Justice Freedman was given the task of looking into the area of law where the Tribunal's recommendations were being rejected, so that this issue was considered to be an important issue judicially.

The ground to the power to make recommendations

An appeal to a Tribunal can be made against Sections B, F and I of the EHC plan, by Section 51(2)(c) of the Children and Families Act 2014. The SEND (FTT Recommendation

Power) Regulations 2017, provides that where an appeal is brought under Section 51(2)(c) of the CFA 2014, the FTT has power to recommend that social care provision, is specified in the EHC plan.

Regulation 5 is relevant.

> 5(2) When determining an appeal on matters set out in Section 51(2)(c), (d), (e) or (f) of the Act, the First-Tier Tribunal's power to recommend that –
>
> (a) Health care provision or health care provision of a particular kind is specified in an EHC plan in accordance with Regulation 12(1)(g) of the 2014 Regulations.
>
> (b) The social care provision specified in the EHC plan in accordance with Regulation 12(1)(h) of the 2014 Regulations is amended.

However, the case law at the moment has been principally dealing with social care provision, hence the emphasis above.

The power to make recommendations in relation to social care needs is contained in Regulation 4(2). Recommendations were made, as in both the cases of AT and BT by their Father and Litigation Friend CT v Barnet (2019) EWHC 3404 (Admin) and The King on the Application of LS v The London Borough of Merton (2024) EWHC 584 (Admin). In the two cases above, the recommendations on social care were rejected by the local authority. Before looking at the issue of the local authority's rejection of recommendations, it is appropriate to turn to Judge Stout's decision in MM v Greenwich as an Alternative Person for C v Royal Borough of Greenwich (2024) UKUT 179 (AAC). In that case, the issue came before the Upper Tribunal, based on the fact the Tribunal determined it was unable to make recommendations in respect of health and social care, given that a transition plan had not been completed. The case for the Appellant was that the Tribunal acted irrationally and failing to apply Upper Tribunal Judge Ward's decision in VS and Another v Hampshire CC (2021) UKUT 187 AAC. Judge Ward found that the Tribunal ought to be willing to make recommendations, even where the evidence was thin, so as to apply and not to frustrate the purpose of the 2017 Regulations. In the particular case, the Tribunal had received a draft plan but not a final transition plan. The submission by the Appellant was the documents before the Tribunal actually included a wealth of evidence about C's needs on the basis of which (together with other evidence in the bundle) the Tribunal could have made recommendations as to social care. The Tribunal's refusal to do so was irrational or inadequately reasoned, it was argued.

In relation to the power to make recommendations in Regulation 7, Judge Stout commented that it was very similar to the Tribunal's powers to make orders in standard SEN appeals in relation to Sections B, B and I of the plan.

> 43 – Powers of the First Tier Tribunal…
>
> (2) *When determining an appeal, the powers of the First-Tier Tribunal* ***include the power to –***
>
> *(a) dismiss the appeal,*
>
> *(b) order the local authority to arrange an assessment for the child or young person under Section 46 or a re-assessment….*
>
> *(c) or the local authority to make and maintain a plan where the local authority has refused to do…*
>
> *(d) refer the case back to the local authority for them to reconsider whether, having regard to the observations made by the First-Tier Tribunal, it is necessary for the local authority to determine the special educational provision for the child or young person….*
>
> *(e) or the local authority to continue to maintain the EHC plan in its existing form, where the local authority has refused to do so …*
>
> *(f) or the local authority to continue to maintain he EHC plan with amendments…*
>
> *(g) order the local authority to substitute in the EHC plan, the school or other institution or type of school or institution specified in the EHC plan…*
>
> *(h) where appropriate, when making an order in accordance with paragraph (g), this may include –*
>
> *(i) a special school or institution approved under Section 41 where a mainstream school or mainstream post-16 institution is specified in the EHC plan, or*
>
> *(ii) a mainstream school or mainstream post-16 institution or a special school or institution approved by Section 41, is specified in the plan.*

Judge Stout drew attention to the difference in Regulation 42 of the Special Educational Needs Regulations 2014, and Regulations 4 and 5 of the 2017 Recommendations, particularly as Regulation 43 of the 2014 Regulations provides for the making of orders, rather than recommendations. In the course of her judgment, Judge Stout did consider the two above judicial review cases, but as already indicated, the issue in that case was rather different. At page 52, paragraph 108(b), Judge Stout stated – *The First-Tier Tribunal's jurisdiction in this respect (under the 2017 Regulations) is like that of a Local Government in Social Care Ombudsman, which also has only a power to make recommendations. As a judicial panel, including members with special expertise, the First-Tier Tribunal's jurisdiction is arguably stronger. Indeed, the First-Tier Tribunal is the only independent Tribunal that has been given jurisdiction to adjudicate on health care and social care provision. As the High Court judicial review's the local authority decisions not to implement the Tribunal recommendations show, the recommendation can be a powerful tool.* In paragraph 108(e), Judge Stout stated – *The Tribunal is not however required before determining what to order should be specified in Sections B and F, or what recommendation should be specified in Sections C, D, G and H, to ensure that the various statutory steps that the local authority should have carried out before making or amending an EHCP are completed. It is well established that the fact the local authority has failed to comply with the requirements of Regulation 6 of the 2014 Regulations, by obtaining necessary advice (as to education, health and social care), in the course of the statutory assessment, or as part of review in the EHCP (Reg. 20 of the 2014 Regulations) before making or amending an EHCP, does not prevent the Tribunal from making a determination in relation to Sections B, F and I of the EHCP. Nor does it matter, when it comes to the Tribunal's jurisdiction, in respect of Sections D, G and H, that a local authority has failed to complete a social services assessment as required by the legal framework set out, or the NHS has failed to complete an NHS Continuing Care Assessment.* So far as the Tribunal is concerned, these assessments are not necessary pre-conditions to the exercise of its jurisdiction, but merely one by means by which the evidence may be put before the Tribunal to consider the exercise of its jurisdiction. In the course of the judgment, Judge Stout also referred in paragraph 108(i) that a recommendation for social care provision made by the Tribunal will *carry more weight if it is made on the basis of evidence and by reference to the relevant eligibility criteria.* For these reasons, as a matter of good practice, in cases where social care recommendations are sought under the 2017 Regulations, the First-Tier Tribunal shall require the local authority to provide it with the relevant local criteria. The same goes for health care, although different considerations may apply.

Ultimately, Judge Stout considered that the Tribunal was acting irrationally in refusing to make recommendations in relation to health care, without seeing the final transition plan, or it had not given adequate reasons. Judge Stou pointed out at paragraph 115, that the Tribunal, even if it had no evidence relating specifically to social care, it could still make recommendations. But in the present case, the social care evidence should have been considered. At paragraph 116, Judge Stout comments – *The present case is not, however, one in which social care evidence could be regarded as "thin". The Tribunal had before it all the evidence it had received about C and his needs, as a result of considering his educational needs and provision. It had a detailed independent social worker report. It had a witness statement from the local authority social worker, and a draft transition plan that contained a wealth of information about C's needs – sufficient in fact for the local authority's panel to have concluded as recorded the draft plan, that despite MM not having participated, it would propose a care package for C.* At paragraph 120, Judge Stout decided that the Tribunal misdirected itself in law, and failed to take into account relevant factors and gave inadequate reasons.

Before turning to the implications of the two judicial review cases, it is relevant to note that Judge Stout at paragraph 106, states that he (Freedman J. – *Went on to conclude on an application of ordinary Wednesbury principles that the authority's reasons for departing from the Tribunal's social care recommendation in that case were adequate and reasonable.* In fact, Freeman J. granted judicial review and ordered the local authority to reconsider its position awarding a substantial amount of costs to the Claimant. I do not consider that error made any difference to Judge Stout's determination in the Greenwich case but it is worth noting that the implications of the Merton case were not fully understood.

Looking first at the case of AT and BT v London Borough of Barnet, it is relevant to consider the facts of the case, as they were ultimately rather different from the later case. AT had autism and a severe sleep disorder. His parents appealed his EHCP to the FTT, and sought recommendations under its National Trial jurisdiction. The recommendations from the Tribunal were incorporated in relation to social care for AT and not implemented. Further care assessments were produced by the authority, which offered more limited social care provision to that which was before the Tribunal in evidence. In a further assessment, a local authority considered some of the recommendations made by the Tribunal, would not be in AT's best interests. Instead it recommended an alternative with additional direct payments to be used for a support worker to provide respite in the family home. On this issue, Deputy High Court Judge Phillip Mott K.C. held that this did not comply with Regulation 7, it simply restated the local authority's view. A second further care assessment went further in

explaining why Barnet did not propose to follow the recommendations on overnight respite care, but it did not clearly set out what provision was to be offered instead. Accordingly, the High Court held that this did not provide a sufficiency of reasons required by Regulation 7 of the 2017 Regulations. Subsequently Barnet produced a letter with more reasons. However the High Court held that this was misleading, as it related to daytime not night-time assistance. The High Court rejected reasons that Barnet put forward for departing from the FTT recommendations, and also pointed out that the fact that AT was in a new school, did not remove the need for overnight respite. In essence, the Judge held that the reasons for departing from the recommendations were not only erroneous, but non-existent. He also criticised the conduct of Barnet. They were required to produce a fresh decision.

Pausing there, before going on to consider the Merton case, where the facts are simpler, it is in the experience of the author, not unusual for FTT recommendations to be rejected, particularly on policy grounds. It is quite common for young persons with significant mental health difficulties, who are not yet 18, to fall outside the local policies to support children in need, because of their cognitive ability. Such policies normally are there in order to support those with significant physical or mental disabilities or needs, and severe or possibly moderate learning difficulties. With a view to rationing resources, some local authorities restrict access to support for those of average or above average ability, despite the fact that they have significant mental health and learning needs, not related to their intelligence. It is not unusual for recommendations in such cases to be rejected.

LS v Merton, involved a young person who was extremely violent at home, he had severe learning difficulties and complex needs. The Tribunal decided he required a waking day curriculum/extended day curriculum, extended to the holidays because of the social care recommendations made by the Tribunal. The decision of the Tribunal on extended/waking day, was limited to term time. The local authority issued a decision letter containing reasons, which refused the Tribunal's recommendations on the 9th November 2023, and then replied to the pre-action protocol letter on the 28th November 2023. In relation to the second letter of response, Mr Justice Freedman commented in some detail at paragraphs 31 and 32. He quoted from the letter itself, paragraph 31, and in paragraph 32 significantly, he stated, in relation to the contents of the letter – *It said the expression several transitions in Section B (of the EHC plan) were not understood, while suggesting the section about managing holiday periods was a consideration of how to manage transaction to home during holidays. It said that the PAP was unspecific in its reference to how "totality of the evidence" had not been considered. The evidence of the [ISW] report was taken into account in the decision of the Tribunal and the LA response, which responded to the decision of the Tribunal.* In

looking at the decision in the Barnet case, Phillip Mott K.C., sitting as Deputy Judge of the High Court, paragraph 13 was cited as a good summary of the law by Freedman J. The judge cited paragraph 13 in detail - *Although such recommendation can be rejected and not followed, cogent reasons will be required for so doing. Such reason will need to be even more cogent when the recommendation comes from a specialist tribunal or it has heard evidence in argument.*

Freedman J. in detail, cited from De-Smith's judicial review 9th Edition, paragraph 1098, which cites the case of R (On the Application of Bradley v The Secretary of State for Work and Pensions EWCA Civ 36, 2029 QB 114, at paragraph 70, per Chadwick L.J. That judgment set out in summary the following criteria:

(1) Decision-maker whose decision is under challenge, is entitled to exercise his own discretion as to whether he should regard himself as bound by the finding of fact made by an adjudicative tribunal in the related context.

(2) The decision to reject the findings by an adjudicative tribunal in the related context can be challenged on Wednesday grounds.

(3) In particular, the challenge can be advanced on the basis the decision to reject the finding was irrational.

(4) In determining where the decision to reject the finding of fact was irrational, the Tribunal will have regard to the circumstances in which the statutory scheme within which the finding of fact was made by the adjudicative tribunal.

(5) In particular, the Tribunal will have regard to the nature of the fact found on the basis on which the finding was made on oral evidence or purely on the documents, the formal of proceedings before the Tribunal, adversarial, or in public or investigative.

The reasons given in Merton were plainly based on the authority's policy that children should remain at home with their parents, as much as possible, and that placing the child for 52 weeks in a residential provision, was contrary to their policy and good practice. Thus, the issue in the Merton case was plainly based on the local authority's application of its own policies and practices. The Barnet case involved a local authority trying to give reasons on a number of occasions but the reasons being inadequate, misleading, and irrational. The case is important in the sense that it is dealing with the local authority's application of its own policies, and its rigid refusal to change the position, faced with the Tribunal recommendations The Barnet case provides a good summary of the law, but it does not

adequately deal with the question of *what happens when the local authority rejects recommendations and their rejection is based on their own policies and practices?* Freedman J. then looked at the issue of whether the decision was in fact lawful. In so doing, he analysed the nature of Wednesbury unreasonable, see paragraph 67 onwards. He applied Lady Hale's opinion in Braganza v BP Shipping (2015) UKUT 17 at paragraph 24. In that judgment, Lady Hale and Lord Neuberger agreeing at paragraph 113, set out that there were two limbs of the Wednesbury process. They were:

(1) Focusing on the decision-making process where the right matters have been taken into account in the process. It is part of the rational decision-making process to exclude extraneous considerations taking into account only those considerations that are relevant to the decision; and

(2) Second focusing on outcome, whether even if the right matters have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. It is not to substitute the court's own decision on what is reasonable.

In paragraph 68, Freedman J. commented that Lord Green M.R. in Associated Provincial Picture Houses v Wednesbury Corporation (1948) 1 KB 223, pages 233/4, made it clear that the court was entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to have taken into account or, conversely have refused to take into account or neglected to take into account matters which they ought to take into account.

On the second limb, namely once the matter is answered in favour of the local authority, it may still be possible to say that although the authority have kept within the four corners of the matters, they ought to consider their conclusion is so unreasonable that no reasonable authority could have come to it. It is obvious that it is much more difficult to succeed on the second limb than it is to succeed on the first limb.

Freedman J. at paragraph 69, emphasised the difference between the two limbs of Wednesbury. Looking at that second outcome in paragraph 70, Freedman J. concluded that the court would not be able to find that the decision was irrational or outrageous. However, he went on to consider the decision-making process under the first limb. In summary, his analysis sets out the evidence before the Tribunal and largely set out in the Tribunal's decision. At paragraph 76, he sets out what are seven factors that were not considered by the local authority, although they are listed as three factors. The first factor is divided into some five sections, which are effectively individual factors. An important issue referred to in

paragraph 78, is the local authority's response, in November, where they complained about the PAP being unspecific in reference to the totality of the evidence not being considered, but the Tribunal, at paragraph 113 of its decision, had, in its reasoning in making recommendations, referred to having considered all the evidence. Freedman J. points out this was a legitimate thing to do. In addition, Freedman J. goes on to point out in paragraph 78(iii) – *While not being bound by the decision of the Tribunal, it was a specialist tribunal whose findings deserved weight.* At paragraph 79, Freedman J. stated that the point made that the Tribunal considered the evidence as a whole was significant. He then gave a number of examples in detail, and pointed out in some detail that the Tribunal considered the risks to LS in relation to family life, see paragraph 82. Freedman J., in his findings, stated – *There was a failure in the letters to carry out an exercise in assessment calibration and balancing of the various factors. If there was to be a departure from the decision of the Tribunal, that exercise was required and it did not suffice simply to identify the factors which were identified. This was a failure of process in failing to take into account and assess all relevant considerations.*

What lessons are there to be learnt from the current case law

Firstly, Freedman J.'s analysis of the nature of what can be described as Wednesbury unreasonableness and the fact that it has two separate arms, one procedural and one outcome focused, is in this area of law, very useful, and very relevant. The local authority, as with Merton, will more often than not apply purely social care policy and practice criteria to rejecting Tribunal decisions, and not looking at the underlying basis of the decision itself. Judge Stout's decision in MM v Royal Borough of Greenwich (2024) UKUT 179 AAC, is extremely helpful in this sense. Judge Stout strongly advises Tribunals to ensure that they have before them the local authority's policy documents and guidance in relation to social care and NHS guidance in relation to health care. She makes the valid point that Tribunal's recommendations which is based on detailed evidence, which includes the local authority's policies, practices and procedures, and if possible, such evidence that the local authority put forward, i.e. assessments by Children's Services or Adult Social Care, have far more validity and are far more likely to be enforceable than if the decisions are made in circumstances where the evidence is less comprehensive.

The case decided in (2019) EWHC 3404, Admin, AT and BT v London Borough of Barnet, is perhaps less helpful because the local authority made a number of decisions, and did not produce clear explanations for them. It was not clearly seeking to apply policy and practice

as it was in the Merton case, where the issue emerged clearly. The citation that reasons for rejection must be cogent, the approach of De-Smith at paragraph 1098 cited by Freedman J. at paragraph 58 of the judgment, seem to indicate that a higher standard of scrutiny, will be applied by the courts, where recommendations are rejected. Take for example a child who is 15, still within the jurisdiction of Children's Services, but who would meet the adult criteria for support who is denied access to support from Children's Services. Some local authorities would simply reject the recommendations on the basis of resources. Given the current climate, it obviously would be virtually impossible to argue that the decision is so outrageous as to be capable of the court's intervention. If however, the Tribunal set out detailed factual background to support their recommendations, in its reasoning, as happened in LS v Merton supra, the courts are likely to look at the rejection very carefully to ensure that the relevant factors which are individual to the case, were properly considered, in the decision-making process. More often than not, they will not have been properly considered. It is however very important that the Tribunal does make detailed findings when making recommendations, as all too often, the Tribunal's recommendations may be clear, but they are based on very thin findings because the Tribunal concentrates on Sections B, F and I. Certainly, advocates acting in an appeal would be well advised to make sure that the Tribunal has before it enough evidence to justify its findings and if possible places that detail in its decision. For local authorities, it is important that the Tribunal does have adequate access to policies and practices locally, as well as evidence, if possible, about local resources.

Overall, since the 2017 Regulations, there have been at the moment, when I am writing this article, some four cases. Two in the High Court and two in the Upper Tribunal. That is slightly surprising, bearing in mind the amount of appeals before the First-Tier Tribunal, many of which, in the more complex cases, involve the extended jurisdiction. The dearth of such cases is definitely somewhat surprising. Both Phillip Mott, K.C. in his judgment in the Barnet case, and De-Smith, do suggest that the criteria of Wednesbury unreasonableness, is not simple Wednesbury unreasonableness, but is Wednesbury plus. Both High Court judgments point in that direction, but do not decide the point. It is clear that the High Court wanted a very careful look at this area of jurisdiction, as a result of the insistence of the High Court Judge determining the Merton case. So as far as can be determined, the judgment was intended to give general guidance.

It is therefore extremely important for practitioners to carefully examine the reasoning process. In the Merton case, there was more than one letter contained in the pre-action correspondence, and it was very much on the basis of the combination of both letters but in

particular the second reply of the local authority, that the local authority's decision fell into the area of irrationality. In the Barnet case, none of the explanations given were in short, addressing the issues, and were plainly considered by the High Court to be at least irrelevant and misleading. These cases emphasise the importance of pre-action correspondence.

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