

CDC case law update 9 – June 2016

This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

London Borough of Hillingdon v WW [2016] UKUT 0253 (AAC)

Buckinghamshire County Council v SJ [2016] UKUT 0254 (AAC)

Case overview

These two decisions of the Upper Tribunal concerned the educational needs of disabled young people over compulsory school age. The appeals by the local authority in each case were joined because they both raised issues as to the proper approach in cases where the young person lacks or may lack capacity. Both appeals also involved separate challenges to the reasons given by the First-Tier Tribunal ('the Tribunal') in support of the decisions allowing the families' appeals.

In both cases the local authority's appeals were dismissed. The Upper Tribunal gave important guidance on the proper approach to appeals by young people in future cases. The decision in the Buckinghamshire case is also important on the meaning of 'education' for young people and the duty to issue EHC Plans in cases where the young person may not be able to attain qualifications.

Decisions

The Buckinghamshire case concerned an appeal against a decision not to issue an Education, Health and Care Plan ('EHC Plan'). The Hillingdon case involved an appeal against the contents of an EHC Plan, particularly in relation to the school named. Both appeals involved 'young people', defined as a person over compulsory school age but under 25.¹ Both appeals succeeded in the Tribunal, with Buckinghamshire directed to issue a plan and Hillingdon ordered to name the family's preferred school.

In their appeals to the Upper Tribunal, the local authorities raised issues as to how the appeals were brought in the Tribunal. In the Buckinghamshire case, the local authority accepted by the hearing that the First-Tier Tribunal had not made any error of law in this regard. It was accepted that the young person lacked capacity to bring the appeal and so it had been properly brought by his parent as the 'alternative person' (see below). In the Hillingdon case, the local authority challenged the

¹ See section 83(2) of the Children and Families Act 2014.

approach taken by the Tribunal to the young person's capacity to bring the appeal.

The Upper Tribunal noted that it was important that the right of appeal to the First-Tier Tribunal for young people should be effective. There were three possibilities: (1) the young person has capacity to appeal, (2) the young person lacks capacity to appeal, or (3) their capacity to appeal may be in doubt.

The approach to capacity comes from the Mental Capacity Act 2005 ('MCA 2005'). Under the MCA 2005 capacity is decision-specific and time-specific. The Upper Tribunal noted that under section 1 of the MCA 2005, 'a person is presumed to have capacity until shown otherwise and then only after all practical steps have been taken without success to help them make a decision'.

Importantly, the Upper Tribunal was clear that 'Whether a person has capacity is a matter of fact for the tribunal to decide'. The parties are required to co-operate to draw any issue to the Tribunal's attention and provide any evidence needed to resolve the issue.

The Upper Tribunal noted that 'young persons who have capacity are in no different position from anyone else'. They bring the appeal themselves and can 'appoint someone to help and act for them'.

If a young person lacks capacity to bring the appeal, then the right to appeal passes to an 'alternative person'. This is their 'representative' if one exists, being a person appointed by the Court of Protection to make relevant decisions as a Deputy or a person with Power of Attorney. If no 'representative' exists, the 'alternative person' will be the young person's parent. This is the effect of section 80 of the Children and Families Act 2014 and regulation 64 of the SEN and Disability Regulations 2014.

The Upper Tribunal described this as a 'statutory substitution of the alternative person for the young person'. As such, 'For the purposes of appeals...it is the alternative person who is the appellant or respondent'. The alternative person must advance the appeal in the best interests of the young person. They may do so on their own or through 'a representative in the advocacy sense', for example a lawyer.

If a young person's capacity to appeal is in doubt, the issue may well need to be resolved by the First-Tier Tribunal as a preliminary issue before it identifies the correct parties.

If a young person's capacity changes during the proceedings, the First-Tier Tribunal may substitute another party as appellant or respondent.

As noted above, it was accepted that the young person in the Buckinghamshire case lacked capacity to bring his appeal. As such the parents had the right of appeal in his case as the 'alternative person'. The local authority ultimately accepted that there was no error of law in this approach.

In the Hillingdon case, the Upper Tribunal concluded that 'the statutory assumption of capacity was not displaced and the case was properly registered with William as appellant'. Moreover there was 'no evidence to suggest any difference of view between William and his mother. The formal registration and identification of the appellant did not make any practical difference in this case. William needed help to present his case and his mother would provide that help, with the assistance of solicitors, whether the appellant was William himself or his mother as the alternative person.'

The decision on the rest of the appeal in the Hillingdon case was, in essence, that the Tribunal was entitled to find that the local authority's chosen provision could not meet the young person's needs and that specialist residential provision was required.

In the Buckinghamshire case, the Upper Tribunal held that the Tribunal was entitled to find that the young person required an EHC Plan. Importantly for future cases, the Upper Tribunal Judge stated that 'I reject any suggestion that the attainment of qualifications is an essential element of education. For many of those to whom the 2014 Act and Regulations apply, attaining any qualifications at all is not an option. That does not mean that they do not require, or would not benefit from, special educational provision.'

On the facts of the case, the Tribunal was entitled to find that the young person could still benefit from educational provision and that therapies would help in that context. While 'there may be cases in which a young person is not going to achieve anything if education continues', this was not such a case. It is also important that the Upper Tribunal noted that 'any further achievements would be small. That does not mean that they would not be valuable for Ryan in his adult life.'

A further point of wider importance from the Buckinghamshire case was that in assessing whether an EHC Plan is necessary, 'Necessity has to be judged practically and in light of the reality, not by reference to attainments that are more theoretical than real'. As such the local authority's submission that outcomes could instead be achieved through social care provision was rejected when 'In reality, that was not happening'.

What this means for children, young people and families

These decisions give important clarity about how to approach Tribunal appeals for young people over compulsory school age.

It will be important for families to consider whether the young person has capacity to bring the appeal themselves. This involves applying the four-stage test in section 3 of the MCA 2005:

- A. Does the young person understand the information relevant to the decision?
- B. Can they retain that information?
- C. Can they use or weigh that information as part of the process of making the decision?
- D. Can they communicate the decision (whether by talking, using sign language or any other means)?

In answering these questions families need to keep in mind the important principle that a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

In many cases it will be necessary for an assessment of capacity to be undertaken by an appropriate professional, for example a medical professional or a psychologist.

If the assessment concludes that the young person has capacity, then they will need to bring the appeal themselves but can appoint someone to act as their representative (in the advocacy sense). Under rule 11 of the Tribunal Rules², the representative may do anything except sign a witness statement or application notice for the young person.³ This will often be a family member such as a parent. The young person can of course have help and practical assistance from their parents (or any other appropriate person) in bringing the appeal, even if they are not formally appointed as a representative under rule 11.

If the assessment shows that the young person lacks capacity, the appeal must be brought by the 'alternative person', either a 'representative' (most likely a health and welfare Deputy appointed by the Court of Protection) or by a parent if there is no 'representative'. In many cases of course any 'representative' will also be the parent. The alternative person can act on their own or appoint a representative (in the advocacy sense), including a legal representative. As noted above the alternative person brings the appeal in their own right but must act in the best interests of the young person.

² The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

³ Legal representatives may sign application notices.

The Upper Tribunal noted that a young person may have capacity in relation to the decision to appeal to the Tribunal, but 'not in respect of other decisions that have to be made in the course of proceedings'. In such complex cases it will be particularly important to take case-specific advice on the appropriate way forward.

Capacity issues should be resolved as early as possible in the appeal process, if possible before the appeal is issued. It is important that advice should be obtained on the facts of individual cases.

The Buckinghamshire case also shows that the meaning of 'education' for young people must not be narrowly defined as linked to attainment of qualifications. Even the potential for small further achievements may be sufficient to require an EHC Plan to be issued (or maintained) if these achievements will be valuable for the young person in adult life.

Implications for local authorities and other public bodies

Local authorities must be alert to the question of whether young people have capacity to make decisions in relation to EHC Plans and subsequent appeals to the Tribunal. For example, this may affect the person to whom decision letters in relation to draft and final EHC Plans are sent.

Where appeals are issued, local authorities have an obligation to bring any issues in relation to capacity to the attention of the Tribunal and to assist with obtaining any necessary evidence to resolve these issues.

The Tribunal itself has a particular obligation to ensure that young people's decision making rights under the Children and Families Act 2014 are respected. This will be particularly important where there is any suggestion of conflict between the young person and their parents. In all cases the views, wishes and feelings of the young person must always be central to the Tribunal's decision, not least to ensure compliance with section 19 of the Children and Families Act 2014.

Local authorities should not adopt a narrow approach to 'education' for young people over compulsory school age and in particular must not limit EHC Plans only to those young people who may be able to attain qualifications.