IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. HS/3864/2014

Appellant:	Ms Lorraine Ward
Respondent:	Norfolk County Council
Heard at:	Field House, London
Date of hearing:	4 February 2015
Date of decision:	9 February 2015

DECISION OF THE UPPER TRIBUNAL

A C ROWLEY

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal:	First-Tier Tribunal (HESC Chamber)
Tribunal Case No:	SE926/13/00077
Tribunal Venue:	Norwich
Hearing date:	12 March 2014

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. HS/3864/2014

Before: A. Rowley, Judge of the Upper Tribunal

Attendances:

For the Appellant: Mr. John Friel of counsel
For the Respondent Mr. Sean Bowers, solicitor

Decision:

1. I admit an application for permission to appeal against the decision of the First-tier Tribunal dated 6 October 2014. I waive the requirements of rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it being implicit in rule 7(1) that a requirement can be waived if insisting on it would serve no purpose.
2. I give permission to appeal against the decisions of the First-tier Tribunal dated 22 May 2014 and 6 October 2014.
3. The Appellant's appeals against the decisions of the First-tier Tribunal dated 22 May 2014 and 6 October 2014 are allowed. The decisions are set aside and the case is remitted to be decided by the First-tier Tribunal.
4. It is directed that further case management directions are to be issued by the First-tier Tribunal.

REASONS FOR DECISION

A. Introduction

1. There was an oral hearing on 4 February 2015 before me. The Appellant was represented by Mr. John Friel of Counsel, and the Respondent by Mr. Sean Bowers, solicitor. I am grateful to them both for their submissions and assistance in determining the appeal.

2. Section 9(1) of the Tribunals, Courts and Enforcement Act 2007 gives to the First-tier Tribunal the power to review a decision made by it on a matter in a case (other than a decision that is an excluded decision for the purposes of section 11(1)). The primary issue in this case concerns the application of that provision.

B. The context

3. The Appellant is the mother of Theodore ("Theo"), who is now 10. He has complex educational and medical needs. The Respondent made and maintains a statement of special educational needs in respect of Theo.

4. Theo has not been educated in a school since June 2013. Both parties want him to be educated in a school, but cannot agree on which one. In the statement of special educational needs the Respondent named St. Andrew's School, an independent school for pupils with autism or social communication difficulties. The Appellant would like Theo to attend Alderwasley Hall School, an independent school and registered children's home for pupils with complex speech, language and communication needs.

5. The Appellant appealed to the First-tier Tribunal, raising various issues under Parts 2 and 3 of the Statement, and requesting that Alderwasley Hall School be named in Part 4.

6. The First-tier Tribunal heard the appeal on 12 March 2014, and issued a decision on 22 May 2014. Amendments were made to Parts 2 and 3 of the Statement, but the First-tier Tribunal decided that the school should be named as St. Andrew's School.

7. The Appellant sought permission to appeal. The file came before Tribunal Judge Brayne who issued a document dated 7 July 2014 entitled "Decision." I shall address in further detail the contents of this document below. Suffice to say for present purposes, it purported to review the First-tier Tribunal's decision, and sent the matter back to the First-tier Tribunal.

8. The Appellant sought permission to appeal against the decision dated 22 May 2014 to the Upper Tribunal. Upper Tribunal Judge Jacobs refused the application on the papers, on the basis that he was of the view that Judge Brayne had set aside that decision and there was, therefore, no longer a decision against which the Appellant could apply for permission to appeal.

9. The Appellant duly applied for reconsideration of her application for permission to appeal at an oral hearing. On 27 August 2014 Upper Tribunal Judge Ward stayed further consideration of that application until after the First-tier Tribunal had issued its new decision.

10. On 26 September 2014 the original First-tier Tribunal panel re-convened, and on 6 October 2014 issued two documents, entitled "Review of Decision" and "Reviewed Decision" respectively. Again, I will deal with the contents of these documents below.

11. On 27 October 2014 I gave case management directions, which included a direction lifting the stay imposed by Judge Ward. I held an oral hearing on 4 February 2015, and directed the Respondent to attend.

12. A number of procedural points arose at the hearing before me. I can deal with them briefly:

    12.1. The Appellant had sought to challenge Judge Brayne's decision dated 7 July 2014 by way of judicial review (JR/5534/2014), as it fell within the category of an "excluded decision" under section 11(5)(d) of the Tribunals, Courts and Enforcement Act 2007. The parties agreed that that decision was, indeed, an "excluded decision," but the Appellant was entitled to rely on any ground for judicial review on an appeal for error of law, and that it would be proportionate simply to deal with the case on the basis of an appeal for error of law. In the circumstances, in JR/5534/2014 I have refused permission to the Appellant to challenge Judge Brayne's decision by way of judicial review.

    12.2. Despite the formal requirements of rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (relating to an application to the Upper Tribunal for permission to appeal) not having been complied with, the parties agreed that I should admit a document dated 19 November 2014 as an application by the Appellant for permission to appeal against the decision of the First-tier Tribunal dated 6 October 2014.

12.3. The parties agreed that the matter should be rolled up into a substantive appeal hearing against the decisions of the First-tier Tribunal dated 22 May 2014 and 6 October 2014 respectively.

C. The statutory framework for review by the First-tier Tribunal

13. The First-tier Tribunal's review power is governed by the Tribunals, Courts and Enforcement Act 2007 and the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699).

The Act

14. Section 9 provides for review:

"9 Review of decision of First-tier Tribunal

(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).

(2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable –

(a) of its own initiative, or

(b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.

(3) Tribunal Procedure Rules may –

(a) provide that the First-tier Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;

(b) provide that the First-tier Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules is exercisable only of the tribunal's own initiative;

(c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;

(d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the First-tier Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules.

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following –

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

(5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either –

(a) re-decide the matter concerned, or

(b) refer that matter to the Upper Tribunal.

(6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter.

(7) Where the Upper Tribunal is under subsection (6) re-deciding a matter, it may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter.
(8) Where a tribunal is acting under subsection (5)(a) or (6), it may make such findings of fact as it considers appropriate.
(9) This section has effect as if a decision under subsection (4)(c) to set aside an earlier decision were not an excluded decision for the purposes of section 11(1), but the First-tier Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection (4)(a).
(10) A decision of the First-tier Tribunal may not be reviewed under subsection (1) more than once, and once the First-tier Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.
(11) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (10) to be taken to be different decisions."

15. Section 11 limits the right of appeal in respect of decisions under section 9:

"11 Right to appeal to Upper Tribunal
(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
...
(5) For the purposes of subsection (1), an 'excluded decision' is –
...
(d) a decision of the First-tier Tribunal under section 9 –
(i) to review, or not to review, an earlier decision of the tribunal,
(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,
(iii) to set aside an earlier decision of the tribunal, or
(iv) to refer, or not to refer, a matter to the Upper Tribunal,
(e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun), ..."

The Rules

16. Insofar as is relevant, rules 47 to 50 of the 2008 Rules provide –

"47.
(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 49 (review of a decision).
...

48.
(1) This rule applies to decisions which dispose of proceedings in special educational needs cases, but not to decisions under this Part.

(2) A party may make a written application to the Tribunal for a review of a decision if circumstances relevant to the decision have changed since the decision was made.

...

49.
(1) The Tribunal may only undertake a review of a decision—
(a) pursuant to rule 47(1) (review on an application for permission to appeal) if it is satisfied that there was an error of law in the decision; or
(b) pursuant to rule 48 (application for review in special educational needs cases).
(2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
(3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

50.
The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."

D. The "review decision"

17. The parties agree that the decision dated 7 July 2014 cannot be held up as a model of clarity. However, what is clear is that Judge Brayne was purporting to review the First-tier Tribunal's decision dated 22 May 2014; he said in terms that he had decided to review that decision.

18. Undoubtedly, Judge Brayne had the power to review the decision of his own initiative pursuant to the provisions of section 9 of the 2007 Act. Indeed, rule 47 provides that, having received an application for permission to appeal, he was obliged to consider whether to review the decision. Judge Brayne obviously had in mind the provisions of rule 49(1)(a) when he expressly identified two errors of law on the part of the First-tier Tribunal, namely in relation to (a) calculation of costs, and (b) reasonableness of public expenditure under section 9 of the Education Act 1996.

19. Having found that the threshold conditions for a review were satisfied, ideally Judge Brayne should have gone to state expressly whether he was exercising the discretion bestowed upon him by section 9(4) of the Act to do any of the following, and if so which: (a) correct accidental errors in the decision or in a record of the decision; (b) amend reasons given for the decision; (c) set the decision aside.

20. Regrettably he did not do so. Instead, he said:

> "2. The original panel should re-decide the issue of placement in light of the correct figures and of the section 9 [of the Education Act 1996]

> criteria, which, in essence are the reasonableness of the additional public expenditure in light of the parents' reasons for preference. The Tribunal will need to consider whether the relative advantages (if any) justify the additional public expenditure, as recalculated.
>
> 3. The other alleged errors are not established. Having consulted Judge Vassie [the Judge who presided over the original hearing], and in reliance on her record, her recollection and consultation with other panel members, I am satisfied that the Tribunal had robust evidence, which the [Appellant] was fully aware of, for its findings under the following headings. As the Tribunal essentially followed that evidence it made no error of law in not setting out detailed reasons. However, given the somewhat remote possibility that the [Appellant] is unable to identify the reasons for the particular decisions on these issues there is an arguable error of law and the Tribunal on review should take the opportunity to explain the evidence on which each issue was decided, but it should not go beyond the summary set out below...."

21. Judge Brayne proceeded to set out a list of issues, giving a commentary as to whether or not the original tribunal had heard evidence on them, and if it had what its findings and reasons were. Judge Brayne concluded:

> "16. The errors of law in relation to calculation of costs require a recalculation of relative costs and then a fresh decision applying section 9 criteria. There is no need for further findings of fact, and therefore the original panel should make the fresh decision on placement. It should incorporate in the fresh decision its explanation of the evidence received, in line with the above explanations, for the findings on the issues raised above..."

22. Whilst there is no suggestion that Judge Brayne was seeking to correct any accidental errors pursuant to section 9(4)(a) of the Act, some passages of his decision suggest that he was remitting the matter to the original panel to amend reasons given for the decision under section 9(4)(b), whilst others indicated that he intended to set aside their decision under section 9(4)(c). The parties agreed that there was some ambiguity, but each submitted that, taken as a whole, Judge Brayne's decision had set aside the original decision and remitted the matter to be re-heard by the First-tier Tribunal. On balance, I agree with this conclusion.

23. However, Mr. Friel submitted, and during the hearing Mr. Bowers conceded, that there were some significant procedural irregularities involved in the review process:

    (a) Judge Brayne ought not to have discussed matters with Judge Vassie in the way recorded at paragraph 3 of his decision. Such a discussion was un-necessary for the purposes of the exercise of the review powers, and gave the impression that the process was not a transparent and fair one.

    (b) Judge Brayne should not have fettered the scope of the decision to be made by the panel which was to re-decide the matter. That should have been left to the panel to establish as a case management issue.

24. The parties agreed that these irregularities were of such a magnitude as to cause procedural unfairness and taint the review process to such an extent

that Judge Brayne's order was of no effect. In those circumstances, the decision of 6 October 2014 does not even fall to be considered, and the appeal lies against the original decision dated 22 May 2014. Both parties further agreed that that decision contained the errors of law identified by Judge Brayne and must be set aside. In my judgment that is the correct analysis in this case.

25. I should add that it seems that rule 49(3) of the 2008 Rules was not complied with. It required that notice should have been given to the parties (in particular, in the circumstances, the Respondent) so that they may have had the opportunity apply for the setting aside decision itself to be set aside. However, it may well be that nothing turned on the omission in this case.

E. The "new" decision

26. For the sake of completeness, at the oral hearing I went on to consider submissions concerning the "new" decision of 6 October 2014. Unfortunately, the theme of procedural irregularity continued to unfold.

27. In a letter and Request for Changes dated 9 September 2014 the Appellant's solicitor sought directions from the First-tier Tribunal. In particular, she wished to adduce further evidence on the issue of costs. That evidence was relevant, and had not been considered by the panel at the original hearing. She also wanted to rely on information which indicated that some evidence which had been given to the panel at the first hearing had been inaccurate. The letter indicated that, as Judge Jacobs had been of the view that the original decision had been set aside by Judge Brayne's order, a re-hearing was required. Under a Request for Changes dated 16 September 2014 the Appellant's solicitor sought to adduce yet further evidence showing, she said, that misleading evidence had been given at the original hearing.

28. However, the only communication from the First-tier Tribunal was an order dated 22 September 2014 of Judge Vassie. It provided that: (a) the panel would meet on 26 September 2014 to consider the various representations made by the Appellant's representatives following the decision of Judge Brayne; (b) the Appellant's representatives may respond to a costs document provided by the Respondent on 24 September 2014; and (c) apart from that, no further documents or representations by either party would be considered by the panel.

29. The panel then proceeded to meet on 26 September 2014, in the absence of the parties. It issued two documents on 6 October 2014. The first of these was headed "Review of Decision." Having recited Judge Brayne's order, it said:

> "The original panel reviewed its decision on 26 September 2014 on the basis of further costs information and representations provided by the parties. The panel did not have regard to other evidence provided on behalf of [the Appellant] after the original hearing."

30. The document proceeded to set out the panel's conclusions on the calculation of costs and reasonableness of public expenditure. It expressly recorded that it had not had evidence on a number of matters, including (for example) the Appellant's willingness to transport Theo to Alderwasley House School and quantification of social care costs if Theo was placed at that school. Those

matters had been specifically addressed in the further evidence which the Appellant had sought to adduce.

31. The second document dated 6 October 2014 was headed "Reviewed Decision." In essence, this consisted of the original decision dated 22 May 2014, with a paragraph added to the body of the decision (dealing with the calculation of costs), and paragraphs added to the end along the lines directed by Judge Brayne.

32. I heard submissions as to the status and effect of these documents, on the assumptions that Judge Brayne's decision had validly set aside the original decision under section 9(4)(c) of the 2007 Act, and (contrary to my conclusions above) in itself had not been tainted with procedural irregularity.

33. On those assumptions, pursuant to section 9(5)(a) of the 2007 Act the panel was obliged to "re-decide" the matter. I recognise, of course, that speed was of the essence as both the Appellant and Respondent wanted Theo to be educated at a school, and that was not happening. However, the duty to deal with cases fairly and justly under the overriding objective includes avoiding delay *only so far as compatible with proper consideration of the issues* (rule 2(2)(e) of the 2008 Rules). In this case, the parties agreed that, given the fact that the remitted hearing was a re-hearing, the tribunal should have given proper consideration to the Appellant's Requests for Change, and (as I have said above) it should have determined as a case management issue the precise issues before it, and the extent to which the issues should be re-opened, unfettered by the comments of Judge Brayne.

34. Further, whilst rule 23(1) of the 2008 Rules ("... the Tribunal must hold a hearing before making a decision which disposes of proceedings unless (a) each party has consented to the matter being decided without a hearing and (b) the Tribunal considers that it is able to decide the matter without the hearing") did not strictly apply (as a case remitted for re-decision is not conducted under Part 5 of the Rules - see rule 23(2)), nevertheless in this case the consensus of the parties was that fairness demanded that they should have been offered an oral hearing. This was not a case where it was appropriate for a narrow outstanding issue to have been dealt with by way of written submissions. Rather, the Appellant had sought to adduce significant, relevant evidence, which was contested by the Respondent. The only proper way for that to have been dealt with was by way of an oral hearing.

35. Yet further, it seems from the terms of the documents dated 6 October 2014 that the tribunal had not "re-decided" the case, but rather had considered matters in the way directed by Judge Brayne based on what it acknowledged in terms was incomplete evidence.

36. For these reasons, there was no dispute between the parties that in reaching the decision of 6 October 2014 the tribunal erred in law. I agree.

F. Conclusion

37. For the reasons set out above, the decision of Judge Brayne dated 7 July 2014 was so tainted by procedural irregularity that it was of no effect. It follows that the decision of 6 October 2014 does not fall to be considered. Rather, the appeal lies against the original decision dated 22 May 2014. Both

parties agree that that decision contained the errors of law identified by Judge Brayne and must be set aside.

38. However, *even if* Judge Brayne's decision could be upheld, the parties agree that the "new" decision dated 6 October 2014 was wrong in law in the ways set out above.

39. Accordingly, I am of the view that each of the tribunal's decisions must be set aside. In the circumstances, the parties agreed that it is not necessary for me to consider the other grounds of appeal in relation to each of the First-tier Tribunal's decisions, as they were on matters of fact and will be subsumed by the re-hearing.

40. The parties were in agreement that the matter must be remitted to the First-tier Tribunal to be re-heard as soon as possible. The First-tier Tribunal will issue further case management directions. These will include whether the case should be remitted to the same panel or a different one. It seems to me that there is no reason in principle why the same panel could not hear the matter, as there is no allegation of bias. However, the predominant factor would appear to be one of avoidance of delay.

A. Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 9 February 2015