DECISION OF THE TRIBUNAL ON PRELIMINARY MATTER

ASNTS\_R\_16\_0015  - PRELIMINARY

# Decision of the Tribunal

This reference is not within the jurisdiction of this Tribunal and so is dismissed under rule 18(2)(b) of the Education (Additional Support for Learning) (Scotland) Act (‘the 2004 Act’).

# Reasons

1. Since the parties are in agreement that the Tribunal does not have jurisdiction to entertain this reference, I can state my reasons relatively briefly. The parties produced written submissions at my request.
2. The child has attended school A, an independent school, since October 2015. The appellant’s placing request was made in October 2015 (A1-3), shortly following the child starting to attend school A. That request was refused by the respondent in their letter in March 2016 (T13-15). This reference was lodged in May 2016, and the case statement process followed. The respondent did not challenge the Tribunal’s jurisdiction in its case statement (R3-11). Following my allocation as Convener to this reference, I raised the jurisdiction point with the parties. This led to further submissions on this point. In the meantime, a reference was made to the Education Appeal Committee (EAC) under schedule 2 para 5(1) of the 2004 Act. That reference is on hold pending this decision.
3. Both parties argue that this reference is not competent, as it is outwith the jurisdiction of this Tribunal and ought to be dismissed. The basis of the argument is (in essence) that the jurisdiction of this Tribunal flows from s.18(1) of the 2004 Act. That provision requires that the challenge in the reference can only be made where the child or young person in question is one for whose school education ‘an education authority are responsible’. A child or young person in this position is defined as one who is ‘being or about to be provided with school education in a school under the management of the education authority’ (s.29(3)(a) of the 2004 Act, the alternative in s.29(3)(b) being inapplicable in this case). So, the ‘decision, failure or information’ (s.18(1)) chosen from the list in s.18(3) as one which can afford access to the Tribunal, may only be chosen in respect of a child who fits the s.29(3)(a) definition. Since the child is currently in an independent school, and with no evidence of a plan to move back into an education authority school, he does not fall within the s.29(3)(a) definition and so a reference under s.18(1) involving him may not be made. This argument is bolstered by the wording of schedule 2, para 5(1) and (2) of the 2004 Act. These provisions set out that a refusal decision may be challenged in the EAC, unless the decision may be referred to this Tribunal under s.18(1).
4. Had that been an end to the matter, my decision would have been straightforward. However, there is an alternative interpretation. The ground of refusal relied upon in this case is the one set out in s.18(3)(da) of the 2004 Act. That ground refers to a placing request as provided for in schedule 2 paras 2(2) and (3) of the 2004 Act. There, the intention seems to be that such a request is one which is made ‘to the education authority for the area to which the child belongs’. This would appear to apply to a child who lives in the relevant area, whether or not he/she is being provided with an education in an education authority school. This test is explicitly incorporated into s.18(3)(da) via the definition of ‘placing request’ in schedule 2 paras 2(2) and (3). On the face of it, therefore, there is a clash since both tests appear in s.18, one in s.18(1), the other in s.18(3)(da). If the test applicable in the latter provision were the correct one, this reference would be valid, since the child is a child who belongs to the respondent’s local authority area.
5. I had considerable difficulty in reaching a decision as to which test prevails. I note that there is a principle of interpretation of legislation which suggests that the specific overrides the general, and this might be said to apply here. In addition, it seems to me that this clash may have arisen as a result of the amendments to the 2004 Act which took place by the Education (Additional Support for Learning)(Scotland) Act 2009 (‘the 2009 Act’). These changes converted s.18 from a section which made provision for references to the Tribunal where a CSP was in place/in contemplation to one which is wider in scope. Indeed, s.18(3)(da) appears to be the only provision (excepting the rather obscure provision in s.18(3)(g)) which does not depend on there being in place/in contemplation a CSP. This links back to the definition of a CSP in s.2 of the 2004 Act, which provides that such a plan may only be prepared for a child or young person for whose education an education authority is responsible. It is not surprising, then, that s18(1) as originally enacted was restricted to such children, given that s.2 applies only to those children. Arguably, when Parliament enacted the 2009 Act, in adding s.18(3)(da), it had its eye on schedule 2, paras 2(2) and (3) – the former is specifically mentioned there – and not on s.18(1), and so omitted to amend s.18(1) to cater for non-CSP related references.
6. For a while, this line of reasoning was attractive to me, and I felt that the clash of tests could be resolved in favour of the one in schedule 2. However, on considering the parties submissions, and in particular the unequivocal terms of schedule 2, para 5(2) of the 2004 Act, I have decided that the test in s.18(1) is the applicable test. After all, schedule 2 to the 2004 Act has not been amended, and so Parliament has had in mind since the outset the test in s.18(1), even when the schedule 2 para 2(2) test was in place. This tips the balance, in my view, in favour of the s.18(1) test. I should add that this decision is in line with the outcome in three other Convener decisions on this point, albeit that the reasoning employed here is not used in those other cases.

Other comments

1. Part of my hesitancy in reaching this decision is that I can think of no sensible reason for Parliament to wish to split cases involving children with additional support needs between the two jurisdictions (this Tribunal and the EAC). Indeed, the very purpose of creating this Tribunal was to provide a subject specialist forum in which to make decisions for all children with such needs. I hope this matter can be resolved satisfactorily in the future.
2. Finally, I note that the respondent expressly leaves open the possibility of making a time bar argument in relation to the EAC reference. While it is a matter for the respondent to make any argument it sees fit, and for the EAC to rule on any such argument, it would, in my view, be very disappointing if the appellant is left without a potential route for redress in circumstances where neither party (both of whom have been legally represented throughout) spotted the jurisdiction issue at an earlier stage. This is no criticism of the legal representation for either party (and I note the appellant has recently changed representative) since the point is an obscure one. It would be unfortunate, however, if one party was able to gain an advantage from this situation. It would also, I would add, hardly serve the interests of the child for a route to an important decision on his education to be blocked on technical legal grounds.
3. These additional comments are, of course, outwith my jurisdiction, but they are offered for what they are worth.