Reference: R/15/0011

Gender: Male

Aged: 17

Type of Reference: Implementation of a CSP

1 Decision of the Convener

(1) I find that this Reference is competent; and

(2) In terms of Rule 40(2), I make the following decision in terms agreed by the parties in writing:

> I find that the Respondent failed to make arrangements for the provision of additional support as specified in THE YOUNG PERSON's CSP, in breach of its duties under Section 11(5)(b) of the Education (Additional Support for Learning)(Scotland) Act 2004 ('2004 Act'). In terms of my powers to do so in Section 19(3) of that Act, I require the Respondent to amend the CSP so that THE YOUNG PERSON'S use of the **is incorporated within it. That amendment, (if not made already) must be carried out by 9th July 2015.

Reasons for Decision

Procedure and agreed disposal

1. THE YOUNG PERSON is currently being educated at School A, a school managed by the Respondent. THE YOUNG PERSON was born in 1997. The Appellant is his father. A CSP in respect of THE YOUNG PERSON was made by the Respondent on **. The parties agreed in writing that this Reference should be dealt with by a Convener alone under rule 26(2)(d) of the Tribunal rules. This is a Reference seeking certain remedies under s.18(3)(d)(ia) of the 2004 Act, alleging a failure by the Respondent to provide (or make arrangements for the provision of) the additional support in THE YOUNG PERSON's CSP. This allegation is in relation to the requirement in THE YOUNG PERSON's CSP that "**will be made available within the complex additional support needs provision, and THE YOUNG PERSON'S use of it will be incorporated within his behaviour plan".

2. During February 2015, THE YOUNG PERSON's Behaviour Support Plan (BSP) was amended to remove all reference to the **. Notification of this was sent to the appellant by e-mail on 4 March 2015 from CG . The Respondent has accepted that this amendment to the BSP was erroneous, and has indicated that reference to the

use of the ** will be restored to the BSP. The Respondent has agreed to withdraw its opposition to this Reference on that basis.

3. The parties have agreed that the Reference should be withdrawn, since the issue has been resolved, as narrated in paragraph 2 above. However, for reasons I explain in paragraphs 7 and 8 of my Directions , a decision on competency is still required, along with a decision confirming the agreed terms.

4. On **2015, I directed that the parties lodge written submissions on the competency question, with the Respondent's reply due on **..

Competency question

5. The competency question which arose in this case focusses on the issue of whether THE YOUNG PERSON's CSP ceased to have effect following his 18th birthday, despite him remaining in full time education. This question arises from the application of a CSP to a 'child or young person' under the 2004 Act. It is arguable that once THE YOUNG PERSON turned 18 years old, he ceased to be a 'child or young person'. THE YOUNG PERSON turned 18 years old on **2015. In these circumstances, the question of the status of the CSP after [the day before his 18th birthday] arises. If the CSP ceases to exist from [that date], arguably no further proceedings in respect of this Reference are competent; a decision under s.18(3)(d)(ia) (dealing with the alleged failure to implement the CSP) could not be made in relation to a CSP which no longer exists. This would apply even to a decision issued by consent.

6. Solicitor for the appellant sets out the relevant legislation in his well-written submission. He goes onto suggest that there is an absurdity arising out of the definitions of 'child' and 'young person' in the 2004 Act. The definitions of those terms are to be found in s.135(1) of the Education (Scotland) Act 1980 ('1980 Act') (applied to the 2004 Act by s.29(2) of that Act).

7. The relevant definitions are as follows:

> 'child': "a person who is not over school age."
> 'young person': "a person over school age who has not attained the age of eighteen years."

Both definitions are referred to by Solicitor for the appellant in his submission. There is also a definition of 'school age' in s.31 of the 1980 Act (as applied to the 2004 Act under s.29(2)):

> "Subject to sections 32(3) and 33(2) and (4) of this Act, a person is of school age if he has attained the age of five years and has not attained the age of sixteen years."

Taking the date of THE YOUNG PERSON's 16th birthday as **2013, and due to the operation of s.31, s.33(1) and s.33(2) of the 1980 Act, it is clear to me that THE YOUNG PERSON ceased to be of 'school age' on **2013. This means that between **2013 and **2015, THE YOUNG PERSON was a 'young person'. On **2015, THE YOUNG PERSON ceased being a 'young person'.

8. However, in my view, although THE YOUNG PERSON ceased being a 'young person' for the purposes of the 2004 Act on ** 2015 (although, in real terms, that is what he is), this does not mean that the CSP comes to a 'shuddering halt' (to use Solicitor for the appellant's expression) on that date. In my view, it is clear that a

person in respect of whom a CSP is made must be a 'child or young person' only at the date when the CSP is made. This is clear from the 2004 Act, in particular ss.2(1) and 9(1).

9. The CSP is further regulated in The Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005, SSI 2005/518. Regulation 11(1) provides, under the heading 'Discontinuance, retention and destruction of the plan':

> "This regulation applies where an education authority discontinue a plan in pursuance of– (a) an exercise of their function to review a plan under section 10 of the Act; (b) their ceasing to be responsible for the school education of the child or young person to whom the plan relates; or (c) a decision of an Additional Support Needs Tribunal under section 19(2)(b) of the Act overturning the decision of an education authority that a plan is required or following a review continues to be required."

It appears that this regulation provides for the only circumstances in which a CSP may, once made, be discontinued.

10. In my view, therefore, the competency decision in this case is much simpler than it might seem. Once a CSP is made, it may only be discontinued in one of the three circumstances outlined in regulation 11(1), above. Taking each in turn, regulation 11(1)(a) does not apply, since there has been no decision by the Respondent to discontinue the CSP under s.10(6)(b) of the 2004 Act. Regulation 11(1)(b) does not apply since the Respondent is still responsible for the school education of THE YOUNG PERSON: he is still being educated at a school for which the Respondent is responsible and, according to Solicitor for the appellant's submission, the plan is that he will remain at school until **2016 . Regulation 11(1)(c) is clearly inapplicable in this case. This means that the CSP, having been made when THE YOUNG PERSON was a young person, remains in place until one of the regulation 11(1) events occurs. This interpretation permits the necessary reviews to take place under s.10 of the 2004 Act, since the wording there (s.10(6)) refers to 'the child or young person for whom the plan was prepared'. There is no requirement that the person to whom the plan relates must be a 'child or young person' at the date of any annual review. I should add that it is clear that there is no intention on the part of the Respondent to discontinue the plan while THE YOUNG PERSON remains at school; this is confirmed by Solicitor for the respondent in his written submission.

11. In any event, had Parliament intended that a CSP should simply cease to apply immediately upon the cessation of 'young person' status, it would have been simple enough to provide for this. Had that been the intention of Parliament, I would have expected that to be made plain. It is possible, of course, that the drafters of the 2004 Act did not consider a situation such as this. However, I think this is very unlikely; Parliament, in framing regulation 11(1) above, squarely considered the circumstances in which a CSP would be discontinued. Given that there are many pupils in Scottish schools who continue to be educated beyond their 18th birthday, I find it difficult to accept that the continuation in place of a CSP for such a person did not enter the consciousness of the framers of the Act and regulations.

12. Solicitor for the appellant carefully constructs a case for the correction of what he describes as a drafting error under the House of Lords case of *Inco Europe Ltd. and Others v First Choice Distribution* [2000] 1 W.L.R. 586 (see paras 21-25 of his written submission). I need not make a decision on these submissions since even if there has been a drafting error, it does not affect my decision in this case – the CSP continues in place until it is discontinued; this result follows from the present wording

as it would have done if the 2004 Act referred to a 'pupil' instead of (or in addition to) a 'child or young person'. Further, I have some reservations about whether it would be competent for this Tribunal to correct a drafting error under the *Inco Europe* formula as this may well be a right reserved to the courts. However, I will offer some comments on these submissions, since they were carefully argued.

13. I would not have made such a correction, even on the assumption that it is competent for me to do so and necessary for a decision in this case. It is not clear to me that the reference point for rights and duties under the 2004 Act, namely the phrase 'child or young person' as opposed to 'pupil' (used under the 1980 Act), causes a problem for those Acts being read together, such that the choice of 'child or young person' was a drafting error. In my view, Parliament made a deliberate choice of 'child or young person' which is used throughout the 2004 Act, including in the long title to the Act. Parliament clearly had in mind the 1980 Act in drafting the 2004 Act; indeed, in s.29(2) of the 2004 Act, the drafters decided to adopt twelve definitions directly from the 1980 Act, not including 'pupil' which, as Solicitor for the appellant points out, is a word which does not feature at all in the 2004 Act. There is some further cross-referencing between the 2004 and 1980 Acts, one example of which involves the connection between references to 'child or young person' and to a provision in the 1980 Act referring to 'pupils' (s.29(4) of the 2004 Act, referring to s.23(3) of the 1980 Act – see Solicitor for the appellant's written submission on this cross-reference at para 15). The 2004 Act also amends the 1980 Act in thirteen changes (in Schedule 3, para 3(2)-(14) to the 2004 Act). In my view, in these circumstances, the use of 'child or young person' instead of 'pupil' must have been deliberate; there was not, in my view, a drafting error. I should add that it is clear to me that the correction power in *Inco Europe* is designed to provide for a case of a clear error, where the draftsman intended one thing, but enacted another. This is not the same as the draftsman enacting what was intended, but where he has, in doing so, failed to fully consider the consequences of what is enacted. Given my decision and the reasons for it explained in paragraphs 5-11 above, I need not comment on the arguments of Solicitor for the appellant's written submission. Those arguments are well expressed and interesting, but they are not applicable, given my reasoning.

14. Having said that, I would make one observation. Parliament has clearly restricted the making of a CSP to those under the age of 18. It seems to me that the making of a CSP for someone over 18 (as opposed to allowing one made before then to continue beyond a person's 18th birthday) would not be competent. Solicitor for the respondent, in his written submission for the Respondent at T31-32 contends that there is a distinction between the power to make a CSP and the obligation to do so. However, in my view, once someone turns 18, he/she is not a 'child or young person' and so cannot be the subject of a CSP made thereafter. An education authority may make a plan for the provision of education to the child which involves the coordination of that provision, but it would not, in such a case, be a CSP under the 2004 Act; it would not attract that special statutory status. In my view, the reason for this restriction on the making of a CSP for a child who is 18 or older is difficult to understand. This is, however, what the 2004 Act clearly (and unambiguously) provides.