



Tribunal (Additional Support Needs) Forum

29 September 2020, Virtual Platform

Each year the Tribunal hosts a forum which provides an opportunity to meet the President and her staff and to discuss topical matters in relation to the Tribunal. The Forum is a valuable information sharing event.

The third Health and Education Chamber (HEC) Tribunal Forum was held on Tuesday 29 September 2020 via Cisco WebEx, a video conference platform. In the comfort of their own homes, from couches, recliners, and kitchen tables, people across Scotland joined us on video conference to replace the physical event because of the pandemic. This is a unique time in our history – Forum attendees participated on the same style of platform used by the HEC in tribunal hearings. This year we had representatives across a range of agencies, including child and parent groups, health, advocacy, mediation, education authorities, disability and ASL information agencies, legal agencies, Scottish Courts and Tribunal Staff and Tribunal members. The next Forum will hopefully be held in the Glasgow Tribunals Centre, 20 York Street, Glasgow and will include a tour of the sensory hearing facilities. The date will be advertised on our Website in due course.

President's Update

The President advised that the HEC is in very good shape to continue to conduct business virtually, without delay, should a further period of lockdown be necessary. This can be said with confidence due to the valiant and heroic efforts of our members, our staff and our IT team.

The President also touched on COVID-19 and remote hearings; the launch of the new sensory hearing suites in Glasgow and Inverness; a suite of guidance on the child; documentary evidence guidance; and finally, an update on the current situation

regarding the proposed transfers of the NHS Appeal Panel, the NHS Tribunal for Scotland and the Education Appeal Committees to the HEC.

Casework Update

The Operations Manager, Mr Paul Stewart, provided statistics over the last reporting year when the Tribunal received the highest number of applications since its inception. The trend remains with placing requests as the highest type of reference and applications from children having autism as their main additional support need.

Practice Focus: Placing Requests

The In-House Convener, Professor Derek Auchie, discussed topical matters in recent placing requests - respite care; the residential school component; and the respective cost and suitability defence.

Practice Focus: Remote Hearings

Legal Member, Ms Collette Gallagher, shared helpful hints and tips to plan and prepare for the smooth running of a virtual hearing.

Below is a flavour of some of the questions and topics discussed at the event.

COVID-19 and Remote Hearings

All hearings fixed for March, April, May and June which were not time critical were postponed to 1 July following the President's case triage system, implemented immediately following lockdown; suspending 43 cases. During lockdown and since, the President and Tribunal members have been able to work remotely to judicially manage cases.

Following a time critical case review in May 2020, the President brought forward the suspension of placing request references to 1 June 2020 to allow Tribunal members to judicially case manage these in advance of the return to school term on 11 August 2020. Tribunal members have worked extraordinarily hard during the pandemic to adjust to new ways of working and new ways of conducting hearings. All placing

request references suspended or delayed due to the pandemic (apart from two which have been suspended for other reasons) will be heard by end October 2020. Co-ordinated Support Plan references and Disability Discrimination Claims remained suspended until 1 July 2020.

The President introduced new remote hearings guidance to Tribunal members in July 2020. This introduced a range of ways in which a hearing may be conducted remotely, either by telephone or by using video conference. Since then the majority of our hearings have proceeded or will proceed using video conference. We will return to physical hearings when it is safe to do so, although it is unlikely for the remainder of this year. Until then, the same sensory hearing principles will apply to our virtual hearings, ensuring there is no background clutter or distractions.

Case Statistics

- 43 cases were suspended due to COVID-19 (34 references and 9 claims).
- All suspended placing requests resumed on 1 June 2020.
- All suspended claims resumed on 1 July 2020. 1 of these was later suspended again for non-COVID related reasons.
- 9 cases also had hearings postponed due to COVID-19. All of these have been unlocked and are now progressing.

Suite of Guidance on the Child

The President has now issued a full [suite of guidance](#) on the child in ASN proceedings and these can be found on our website. This includes guidance on [The Child and the Hearing \(PGN 02/2019\)](#). From this you will see that the President has instructed that the usual processes of hearing witness evidence using techniques of examination-in-chief and cross-examination shall not apply to a child witness.

The President has also formalised the process of sending a letter to the child following the issue of the tribunal decision. Feedback from the national children's service, My

Rights, My Say, suggests this is a valuable tool in explaining the hearing decision and /or the value of the child's contribution.

Documentary Evidence Guidance

Certain provisions have been suspended due to the restrictions created by the pandemic. On the matter of formally reviewing the guidance, the President will review this now in March 2021. If you wish to offer any comments can do so by contacting the President's office, by 20 March 2021, @ HEChamberPresident@scotcourtribunals.gov.uk

From her own review thus far the President can see the positive effects of reducing duplication and focusing the minds of the parties on what specific documentary evidence should be lodged. This is to the overall advantage of all who participate in the hearing.

Electronic Bundle

As a result of the pandemic no physical bundle will be created. The tribunal and parties will work with an electronic bundle. The requirements set out in paragraphs 21 to 33 of the [PGN 01/2019 'Documentary Evidence'](#) are suspended. This removes the requirement for the respondent/responsible body to prepare the bundle (electronic or hard copy).

The guidance still remains in place with regard to duplication and the relevance of documents – including considering whether a partial document should be lodged (where the full document is in excess of 10 pages). At the moment our caseworkers will endeavour to remove duplicated documents but it will assist them greatly if parties thoughtfully prepare their productions.

Education Appeal Committees

Many of you will be aware of the plans to transfer the Education Appeal Committees (EACs) to the HEC. This was suspended pending a consultation exercise. The

President's understanding of the current position is that the Scottish Government are now ready to start preparations for the consultation process.

The President is clear that there is a place for the EACs in the HEC. This Chamber has the right balance of environment, experience and expertise. The culture of an Additional Support Need (ASN) Tribunal hearing is very adaptable for EACs, although the President's expectation would be that EAC applications would be far less complex than ASN applications. For that reason the President has prepared a draft model that would allow the tribunal to hear a number of EAC cases in a day should the transfer to the HEC proceed.

Placing Requests

Respite Care

Q: How (if at all) may the respite provision a local authority puts in place be taken into account in a placing request reference?

A: Generally, only if it can be related to the education of the child and to the ground of refusal being considered; evidence will be required for this. Even then, it is not relevant to the 'respective suitability and cost' ground since that ground is about provision for the child in the two schools (although not restricted to provision in the school building or grounds).

Respite could be relevant at the 'appropriateness in all of the circumstances' stage, but only again if relevant to the education of the child.

On the case law, in *Edinburgh City Council v MDN* 2011 SC 513 (First Division, Inner House), at paragraph [19] of the judgement, the court refers to a 'holistic' view of needs, encompassing educational and social work support. The court in that paragraph is simply summarising the approach of the tribunal in that case; the court does not endorse it. On considering the summary of one of the relevant limbs of the ground of refusal at paragraph [26] of the judgement, there is no mention of a 'holistic' approach; the task is defined there more narrowly.

This applies to respite as to other provision which is not of educational benefit. The reference to “(whether or not educational provision)” in section 1(3)(a) of the 2004 Act only applies where section 1(1) applies, i.e. where the support enables benefit in relation to school education. The phrase “school education” is defined in section 135 and section 1(5)(a) of the Education (Scotland) Act 1980 (as imported into the 2004 Act via section 29(2)), and this definition holds relevance to this question.

Residential School Component

Q: How (if at all) may the residential element of an independent school be taken into account in a placing request reference?

A: It could be relevant to the ‘respective suitability’ question where that ground of refusal is used, even where the current school has no residential element.

Respite provision is not an equivalent consideration to residential provision by an independent school.

However, the residential component in an independent school would require to hold content which is educationally beneficial, and evidence will be required for this. Again, the definition of “school education” (as employed in section 1(1) of the 2004 Act) will be relevant here (see above).

Respective Cost

Q: Where the ground of refusal in schedule 2, para 2(3)(1)(f) of the 2004 Act is being considered, and the respondent does not provide evidence of the cost of educating the child/young person in each of the two schools which are being compared, how should that be dealt with?

A: The cost question could be considered as neutral, since a comparison cannot be carried out where the tribunal has only one of the two figures. However, where the parties agree that the cost to the respondent is ‘nil’ in connection with one school the tribunal is entitled to accept that and unlikely to look behind that.

Where there is no cost information provided by the respondent, it does not mean that the ground of refusal does not, for that reason alone, exist. This is since the ‘respective cost’ part of that ground of refusal can only ever benefit the respondent, since case

law is clear that it is the excess cost to the respondent of the child/young person's attendance at the specified school which is relevant (Lord Glennie in *S v Edinburgh City Council (SM, Appellant)* 2007 Fam LR 2, at para 23).

Lord Glennie explains in that decision that for a school managed by the respondent, the total cost of provision divided by the number of pupils is not the correct costing approach, but explains that the actual cost of provision for the relevant child should be calculated.

English authorities have examined the method of comparative cost calculation in some detail, albeit not under the directly equivalent legislation. The legislation in question in that case law is the equivalent to the test in section 28(1) of the 1980 Act (section 9 of the Education Act 1996): [Slough Borough Council v Special Educational Needs and Disability Tribunal \[2010\] EWCA Civ 668; \[2010\] E.L.R. 687](#) (Court of Appeal), especially para 13; [EH v Kent County Council \[2011\] EWCA Civ 709; \[2011\] E.L.R. 433](#) (Court of Appeal), para 32. These cases may be useful in considering the Scottish 'respective cost' test.

Appropriateness

Q: What is the scope of “if satisfied that in all the circumstances, it is appropriate to [confirm the decision]” (sections 19(4) and (4A) of the 2004 Act)?

A: The reference to “all the circumstances” is a reference to all the circumstances pertinent to the decision (the decision to refuse the placing request) and not to “all the circumstances” in general.

These circumstances will include the fact that a particular ground(s) of refusal has been found to exist, as well as all of the evidence relevant to that ground(s) and in addition anything else of relevance to the decision.

This test is to be considered as at the time of the hearing, even although the decision to refuse the request happened at an earlier point.

Practice and Procedure in Virtual Hearings

Planning and preparation is key to aid the smooth running of a virtual hearing. This includes –

Virtual Platform

A test can be arranged for tribunal members and parties prior to a hearing to allow those to familiarise themselves with the platform.

President's Guidance

[PGN 02/2020 REMOTE HEARINGS AND THE COVID-19 OUTBREAK](#)

Reading this guidance in advance of the hearing can aid tribunal members and parties as to what to expect in a remote hearing.

Witness Preparation

A clear list of witnesses and running times should be prepared in advance of a hearing (running times as an outline only).

Participant email address and telephone numbers should be provided in advance to the tribunal, to allow the hearing clerk to establish contact should any problems arise on the day of the hearing.

The use of witness statements is to be considered in advance of the hearing – this will give tribunal members and parties a clearer idea of questions in advance and will reduce the need for lengthy oral evidence.

Those witnesses unfamiliar with the tribunal process or remote hearings should be directed to the [President's guidance](#) on our website.

The Bundle

An electronic bundle will be created in advance of the hearing.

Tribunal members, parties and their witnesses should ensure that they have the most up-to-date version of the bundle, as this can change over the course of a reference or claim.

Pages from the bundle can be displayed, on screen, during a hearing if required. It should be noted that there will be delay when bringing up a particular part of the bundle on screen and consideration should be given to whether it is necessary to have parts of the bundle displayed.

The use of two Screens

It may be beneficial, if you have access to two screens, to use one for the virtual platform (the hearing) and the other to browse the bundle. Others may wish to print the bundle – do what is best for you.

Flexibility

It would be helpful if the tribunal members and parties could be as flexible as possible on hearing days; including start and end times or order of evidence or witnesses.

Key Learning

- The use of headphones with an integrated microphone will reduce any background interference or noise.
- Minimise movement and other background noise, in particular if you are at home.
- The use of background screens should not be used as this creates distortion and can be distracting. This should be discussed with witnesses.
- Backgrounds should be plain and personal items should not be visible.

The President commented further on key learning points –

- If a witness or party is giving evidence in a school, it has been acknowledged that peak IT times may interfere with the quality of the video platform. Parties should consider this when advising where their witness should give their evidence.
- Evidence can be heard via video or telephone, although video evidence is preferable.

The President also commented on the use of remote / video hearings on the child or young person's accessibility – It is her experience that children are entirely comfortable in the virtual world. The President will review the use of virtual hearings even when

oral hearings return, as the child or young person, may feel more comfortable participating in this way.

Enquires to the Tribunal

The Tribunal received a number of enquiries at the Forum, and in advance, which were discussed. The President's position is set out in blue.

1. COVID-19 and the Tribunal process

The HEC has worked hard to adapt to the challenges of COVID-19.

Over the last two years SCTS administrative staff have worked closely with the HEC President to build efficiencies into their processes in the face of a growing caseload. This included the introduction of new IT equipment for all staff to allow remote working while clerking hearings, the multi-skilling of other staff, the implementation of new documentary evidence guidance, changes to our internal case management system, and additional data analysis to assist with future planning and decision making.

These efficiencies meant that the HEC was equipped for key staff to work remotely from an early stage in the pandemic to ensure continuity of service. When non time-critical hearings were postponed, SCTS administrative staff were able to support Tribunal members in conducting telephone hearings for time critical cases.

The President addressed the case action taken earlier in her presentation.

2. Accessibility of virtual hearings

A number of hearings have taken place using our virtual hearing (VC) platform, Cisco WebEx since July. The HEC is the first Tribunal in Scotland to have been given permission by the President of Scottish Tribunals to use a VC platform for hearings.

These hearings have, in the main, gone very well, with any technical problems being resolved, enabling all hearings to finish within the number of days allocated.

Two hearings have taken place (over 4 days) by telephone: one time-critical case, decided in June, the other more recently.

The VC hearings platform is accessed via the internet, but can be accessed by telephone where there are internet problems. This platform enables evidence and submissions to be delivered live and in a way that all participants can see and hear all other participants as the evidence/submissions are delivered. The audio and visual is of a high quality.

3. *Time sensitive cases delayed by the pandemic*

The President has taken all necessary steps to ensure that the business of the Chamber continues in an efficient manner. Reference is made to the answer to Question 1 for more detail.

4. *What are the legal grounds or basis for the Tribunal considering a request for an additional year at secondary school (beyond 18th birthday)?*

All pupils move from being a 'child' to being a 'young person' upon their 16th birthday. This is by operation of the definition of 'child' and 'school age' in section 135 and 31 of the Education (Scotland) Act 1980 ('the 1980 Act'). The definitions of these terms are imported into the Education (Additional Support for Learning) (Scotland) Act 2004 ('the 2004 Act'), section 29(2).

The term 'young person' is defined in section 29(1) of the 2004 Act. According to that definition, a young person is a person aged 16 or over who is a pupil at a school and who has, since attaining the age of 16, remained a pupil at that or another school.

This means that there is no upper age on the definition of 'young person'. This fits with there being no upper age on the definition of "pupil" in section 135 of the 1980 Act.

A young person under the 2004 Act has the same rights to an education as a child does. In addition, a young person may themselves (unlike a child) make a placing request (section 18(2), schedules 2 and 8 of the 2004 Act).

Where a request is made under the 2004 Act by (or on behalf of) a young person to receive an additional year of schooling following S4, S5 or S6, this is a placing request even where the school specified in it is the school the pupil has been attending. A refusal of that request leads to a right to make a reference to the Tribunal under section 18 of the 2004 Act.

Alternatively (or in parallel), a young person in this position could lodge with the Tribunal a claim under the Equality Act 2010 for an order to place the young person in school for an additional year (or longer) (section 85 and schedule 17, part 3 of the 2010 Act). There is no upper or lower age limit on Equality Act 2010 claimants. The claimant would require to succeed in arguing that the refusal of the request for an additional year represents unlawful discrimination under the 2010 Act to secure such a remedy.

- 5. *The Disability and Carers Benefits Expert Advisory Group has been asked to provide advice on appointees within the Scottish social security system. One of the areas we've been asked to advise on is what the process for independent dispute resolution should look like. Whatever process is arrived at the child's views need to be easy and non-intimidating to provide - that's the most important issue as it's the biggest hurdle. Would the ASNT be a suitable model for this (at least) as a collector of evidence, if not the arbiter themselves?***

The ASN jurisdiction within the HEC has considerable experience in taking the views and evidence of children and young persons in a decision-making environment. The HEC President has developed [Guidance on the Views of the Child](#), and [Guidance on Asking the Child Questions](#). We have also developed child-friendly reference and claim forms and detailed child-friendly advice and information on the HEC's [Needs to Learn web pages](#). In addition, the HEC has access to a unique purpose-built [sensory hearing facility](#), on the 6th floor of Glasgow Tribunal Centre.

On the question of whether the model used by the HEC could be adopted in other jurisdictions that is a matter which could be discussed.

6. *Meeting ASN in Covid-safe way*

The HEC does not have direct jurisdiction over the meeting of ASN needs; we make legal decisions. The legal framework which existed before the COVID-19 outbreak continues to exist during the pandemic, with one or two minor changes. Decisions in cases before the Tribunal will continue to be made on the facts established as applied to the applicable law.

7. *Overlaps between ASNT/CHS for LAC's with ASN*

The law applicable in an HEC case is the same, irrespective of any other proceedings relating to the child. The Children's Hearing System and the ASN jurisdiction can sometimes overlap in relation to a particular child. If there is pertinent evidence which flows from other proceedings relevant to an ASN case the tribunal may take this into account.

8. *ASN Tribunal thoughts on the SG ASL Review action plan and expectations/ implications for local authorities and partnership agencies?*

Assuming this question relates to the Morgan Review "Review of Additional Support for Learning Implementation", published in June 2020, the Tribunal has noted the report and its findings. However, the report is concerned with implementation of rights, which is not a matter on which an independent judicial body can comment. The Tribunal can only apply the law, and cannot take account of (or express a view on) broader implementation issues. If the report leads to legal changes, these will, of course, be relevant to the Tribunal's function.

9. *What are the anticipated timescales for working through the backlog of hearings from during the lockdown, and for new cases that are not time sensitive that are lodged? Are placing request appeals being given any priority?*

Please see the response to Question 1.

The backlog will shortly be cleared (October). In May 2020, the President took the proactive step of bringing forward suspensions on all placing request references, as well as shortening their case statement periods. Since lockdown commenced parties could make a motion for their case to be considered time-critical, although very few motions were lodged.

The President thanked the speakers, enquirers and those in attendance today, for their valuable engagement and input.