IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HSW/3122/2017

ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

DECISION:

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, as applied by section 336ZB(3) of the Education Act 1996, this appeal is **ALLOWED**. The Upper Tribunal decides that the President of the Special Educational Needs Tribunal for Wales had no power to order on 9 October 2017 that Mr S's appeal against Denbighshire County Council's refusal to amend his daughter's statement of special educational needs "shall not be registered". If it is necessary to do so, the Upper Tribunal sets aside the President's order.

This matter is now to be transferred back to the SEN Tribunal for Wales to be dealt with in accordance with the Special Educational Needs Tribunal for Wales Regulations 2012.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom these proceedings are concerned. This order does not apply to (a) the child's parent/s, (b) any person to whom a parent discloses such a matter in the proper exercise of parental responsibility, (c) any person exercising statutory (including judicial) functions in relation to the child.

REASONS FOR DECISION

Introduction

1. This appeal deals with a matter of some practical importance for Welsh local authorities and the parents of children with special educational needs in Wales. An appeal to the Special Educational Needs Tribunal for Wales is made by supplying the Tribunal with an appeal application. The Regulations that govern the operation of the Tribunal require certain information to be included in the application. If an application fails to meet those requirements, does that mean it is not an appeal application at all?

2. I decide that an appeal application's failure to meet the requirements of the Regulations does not render it a non-application. And, under the Regulations, there is little scope for the Tribunal's Secretary to decline to register an appeal application. Defects in applications are generally to be dealt with as case management issues rather than by refusing to register applications.

3. The other point of note concerns the SEN Tribunal for Wales' misconceived attempts to become involved in these proceedings. In this case, the Tribunal or its President initially asserted that they were entitled to respond to a parent's appeal to the Upper Tribunal. Then it was argued that the Tribunal was automatically a party to the appeal. Finally, the Tribunal sought permission to make written submissions in the proceedings. The written submission supplied did not exhibit the neutral and dispassionate stance expected. It was comprised of unreasoned assertions, arguments whose logic I could not follow and simple errors. Worst of all, it dogmatically advanced a particular interpretation of the Tribunal's Regulations, which betrayed a serious misunderstanding of the appropriate role of a tribunal in the (unlikely) event that it makes submissions in proceedings on an appeal against one of its decisions.

Background

The Upper Tribunal's decision of 6 October 2016

4. On 6 October 2016, the Upper Tribunal allowed Mr S's appeal against the decision of the Special Educational Needs Tribunal for ("the Tribunal") to dismiss his appeal against the contents of a statement of special educational needs prepared for his daughter E by Denbighshire County Council. The statement was made on 20 April 2015. For present purposes, I need not say anything further about the Upper Tribunal's decision other than to note that the Upper Tribunal remitted Mr S's appeal against the council's statement to SENTW for re-hearing. Below, this appeal is referred to as "appeal 1".

The council's subsequent refusal to amend E's statement of SEN

5. The Upper Tribunal's decision of 6 October 2016 did not interfere with the statement of SEN made on 20 April 2015. Pending the Tribunal's re-hearing of Mr S's appeal, the statement therefore remained in force.

6. On 27 April 2017, the local authority issued a notice which stated "it has been agreed that [E] is to be assessed under the 1996 Education Act". On 11 September 2017, the authority wrote to Mr S to inform him they had refused his request for a re-assessment of E's special educational needs. Given the notice of 27 April 2017, presumably the authority meant they had refused Mr S's request for amendments to be made to E's statement of SEN, which is consistent with the 11 September 2017 letter's statement that "the panel concluded that there were no significant changes to warrant any adjustments to [E's] education provision currently within the statement".

7. The local authority's letter of 11 September 2017 informed Mr S that he had the right to appeal against their decision to the Tribunal. On 16 September 2017, Mr S provided the Tribunal with an appeal form. In his reasons for appealing, Mr S wrote that the

council continued to ignore his complaints about E's statement. The complaints were not specified but I suspect Mr S meant the complaints he had previously, and vigorously, made about the statement of 20 April 2015.

8. On 21 September 2017, the President of the Tribunal ordered that Mr S's appeal could not be registered until he provided various pieces of information described in regulation 13 of the Special Educational Needs Tribunal for Wales Regulations 2012 ("the Regulations"). The order also stated that, for the purposes of regulation 17(1), the appeal application contained insufficient reasons. Mr S was required to remedy the matters referred to by the President by 5 October 2017 "to enable the Tribunal to register this appeal".

9. By email dated 21 September 2017, Mr S purported to supply the information identified in the President's order of the same date.

10. Meanwhile, proceedings on appeal 1 were ongoing. On 3 October 2017, a Tribunal legal chair permitted Mr S to amend his earlier appeal to include a challenge to Parts 2 and 3 of E's statement (needs and provision to meet needs). A range of case management directions were also made. Different deadlines were given for different directions but the earliest deadline imposed on Mr S was 9 November 2017.

11. On 9 October 2017, the President of the Tribunal ordered "the appeal shall not be registered", for the following reasons:

> "The Appellant has not fully complied with the directions given on the 21st September 2017.
>
> There is another appeal proceeding which deals with the matters which the Appellant is seeking to raise. To register this Appeal would be a re-litigation of the matter and therefore an abuse of process."

12. On 12 October 2017 the President of the Tribunal refused Mr S permission to appeal to the Upper Tribunal against her order of 9 October 2017.

The grounds of appeal

13. I granted Mr S permission to appeal to the Upper Tribunal against the President's decision, on the grounds that the decision involved arguable errors on points of law:

> (1) It was not obvious how Mr [S] failed to comply with the President's directions of September 2017. Arguably, Mr [S] should have been told in order for adequate reasons to have been given for the President's order;
>
> (2) Regulation 17(1) of the Regulations confers power to make one type of direction - a direction to supply reasons for making an appeal. The other

directions given on 21 September 2017 could not have been given under regulation 17(1). It seems clear, therefore, that any power under regulation 36 (which applies to regulation 17(1) directions) was not exercisable in response to any failure to comply with the other directions. The President's reasons did not explain which directions Mr S had failed to comply and it was not clear what power she exercised in making her order;

(3) If the President's order was in fact a strike out order, arguably there were no arguable grounds for a strike out;

(4) If the President's order amounted to a strike out, Mr [S] was not informed of the right to make oral representations before the order was made, as he should have been if the strike out power in regulation 29 was being exercised. Further, arguably the President erred in law in finding that Mr S, in seeking to re-litigate certain matters, committed an abuse of process. As matters stood, nothing had been litigated because appeal 1 had yet to be decided. What was there to be 're-litigated'? This was not explained;

(5) If Mr [S] succeeds on appeal 1, that will result in some kind of amendment to the statement of SEN under consideration. While the Tribunal considers up-to-date circumstances on an SEN appeal (*Wilkin v Goldthorpe (Chair of the SEN Tribunal)* CO/1251/97), maintaining appeal 2 might have had the advantage of enabling the Tribunal, if there were differences between the statements, to make it absolutely clear to all parties that any findings made on appeal 1 apply to the most recent statement. When I granted permission, I did not know if there were differences; my determination said I was "unaware whether the current statement exactly reflected the statement challenged in appeal 1". Arguably, the President erred in law by failing to consider other case management options for dealing with the issue of partial duplication of appeals, such as staying appeal 2.

14. Grounds 2 to 4 in fact all contained the same core issue. What power did the President have to make an order that Ms S's appeal "shall not be registered"?

Legal framework

SENTW Regulations 2012

15. Structurally, the Special Educational Needs Tribunal for Wales Regulations 2012 take a very different approach to that taken by the rules governing special educational needs appeals in England (the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008). The latter rules confer responsibilities upon the "First-tier Tribunal" at large and distribution of those responsibilities to various incarnations of the tribunal such as salaried judges, or even to staff, is dealt with elsewhere. The

Regulations, however, demarcate certain functions and confer them upon specific entities such as the President, a tribunal panel or the Secretary to the Tribunal.

16. Regulation 2(1) defines an "appellant" as a person "entitled to appeal" under Part 4 of the Education Act 1996, and "an appeal" as an appeal under the 1996 Act.

17. Regulation 3 provides that "these Regulations apply to an appeal…entered in the Register on or after 6 March 2012". This provision cannot bear its literal meaning since the Regulations deal to an extent with events that take place before registration.

18. The Regulations have an overriding objective, which is to enable the President or a tribunal panel to deal with appeals fairly and justly (reg. 6(1)). The President and a tribunal panel are required to seek to give effect to the overriding objective when exercising functions under, or interpreting, any regulation (reg. 6(3)). They are also required to "manage appeals…actively in accordance with the overriding objective" (reg. 6(4)).

19. Regulation 12(1) requires an appeal to the Tribunal to be made by application in writing "in accordance with these Regulations", and to be received before a specified time limit. Regulation 12(5) provides that the Tribunal may not consider an "appeal application" unless proceedings are commenced in accordance with regulation 12(1) although this is "subject to regulation 17".

20. Regulation 13(1) sets out matters that an appeal application "must state", including the reason or reasons for making the appeal.

21. Regulation 15(1) requires the Secretary of the Tribunal "upon receiving the appeal application" to take a number of steps including to "enter its particulars in the Register". Regulation 15(5), which is discussed in more detail below, provides for non-registration of an appeal application where the person making the appeal is considered to be "asking the Tribunal to consider a matter which is outside its powers".

22. Regulation 16 confers power on the President to consider "any appeal which is out of time" if the President considers it is fair and just to do so. It has not been argued that Mr S's appeal was made out of time.

23. Regulation 17(1) applies where the appeal application does not include a statement of the reasons for making the appeal which the "President considers sufficient to enable the local authority…to respond to the appeal". The President must direct that reasons be sent to the Secretary of the Tribunal within 10 working days. Regulation 17(2) provides that "regulation 36 applies to a direction under paragraph (1)".

24. Regulation 36(1) permits the President or a panel to dismiss an appeal without a hearing where a direction has not been complied with.

25. Regulation 29(1) requires the Secretary of the Tribunal, in certain cases, to serve a notice on an appellant stating that it is proposed to strike out the appeal, in whole or in part, on a ground specified in regulation 29(2) or for "want of prosecution". Regulation 29(1) requires the Secretary to serve such a notice on the application of the local authority or if the President or a tribunal panel so directs.

26. The regulation 29(2) grounds include that the appeal is made otherwise than in accordance with the 2012 Regulations or "is an abuse of the Tribunal's process". The notice must invite representations (regulation 29(3)) and inform the Appellant that s/he may either make written representations or request an opportunity to make oral representations (regulation 29(4)). The President or a tribunal panel may, after considering any representations made, order the appeal struck out in whole or in part (regulation 29(5)). Such an order may be made without a hearing unless the appellant has requested the opportunity to make oral representations (regulation 29(6)). Oral representations may be made at the start of any hearing of the substantive appeal (regulation 29(7)).

27. Regulation 37(1) confers power on the President, where more than one appeal relates to the same child, to order that the appeals are heard together.

28. Regulation 61 sets out the Tribunal's powers to require a local authority to take action following its decision on an appeal. Where the Tribunal decides that a statement is to be amended, it may order the authority to serve an amendment notice on the parent under Schedule 27(2A) to the Education Act 1996, within 5 weeks (reg. 61(2)(d)).

29. Regulation 72(1) provides that a tribunal Chair may exercise any function of the President under the Regulations. Regulation 72 does not make provision for anyone to exercise a function conferred on the Secretary of the Tribunal although regulation 74 permits a function of the Secretary to be performed by another member of staff authorised by the President.

Part IV of the Education Act 1996

30. Section 326(1) of the 1996 confers on a parent a right of appeal to the Tribunal "if, after conducting an assessment under section 323, the local authority determine not to amend the statement". On such an appeal, the Tribunal may "order the authority to amend the statement, so far as it…specifies the educational provision, and make such other consequential amendments to the statement as the Tribunal think fit" (section 326(2)(b)).

31. Schedule 27(2A)(1) to the 1996 Act provides that a local authority may only amend a statement of SEN in certain cases, including in compliance with a Tribunal order or in accordance with the procedure laid down in that Schedule.

The arguments

The local authority

32. The authority argue the President did not err in law by giving inadequate reasons for her decision: "on sight of the directions and response of the Appellant, it might be abundantly clear what the failure was and one(s) that the Appellant would know" and "there is no need to state the reasons if it is clear from the directions what the shortcomings were".

33. The authority submit regulations 17 and 36 do not "sit easily together" although the reference to regulation 17 in regulation 36 must mean that the Tribunal's regulation 36 powers are exercisable before an appeal has been registered. The President decided that Mr S's appeal was not to be registered because he failed to comply with the directions of 21 September 2017. The President made a lawful decision under regulations 17 and 36 to "dispose of the appeal".

34. Ms B did not provide a response.

Mr S

35. In reply to the local authority's response, Mr S argued the President's reasons for 'striking out' his appeal were inadequate or non-existent, and that he should have been given the opportunity of an oral hearing. He was in fact being penalised for an alleged failure to comply with directions on appeal 1.

Conclusions

36. No party requests a hearing of this appeal. In the light of the issues arising on the appeal, I decide a hearing is not required.

Appeal applications – registration requirements of the SENTW Regulations

37. As I go on to explain, in my judgment the Regulations provide little scope for refusing to register an appeal application, even if the application fails to comply with the requirements of regulation 13.

38. Neither regulation 13 nor any other regulation defines an "appeal application" by reference to the requirements of regulation 13. In other words, the Regulations do not provide that an application only counts as an "appeal application" if it satisfies the requirements of regulation 13. This is consistent with regulation 12(5)'s prohibition on the Tribunal considering an appeal application if proceedings are not commenced in accordance with the Regulations. If an application that failed to comply with regulation 13 was not an appeal application at all, regulation 12(5) would serve no purpose.

39. The registration of appeals is dealt with by regulation 15. Regulation 15(1) confers registration functions on the "Secretary of the Tribunal", rather than on the Tribunal or its President. It requires the Secretary, upon receiving the appeal application, to enter its particulars in the Register and perform various other actions. The Secretary has no discretion to decide for herself not to enter an appeal application's particulars in the Register. In one case, however, regulation 15(5) makes provision for an appeal application not to be registered:

> "(5) Where the President and the Secretary of the Tribunal are of the opinion that on the basis of the appeal application…the person making the appeal…is asking the Tribunal to consider a matter which is outside its powers, the Secretary of the Tribunal may give notice to the person—
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> (a) stating the reasons for the opinion; and
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> (b) informing the person that the appeal application or the claim application must not be entered in the Register unless, within a specified time (which must not be less than 5 working days), the person notifies the Secretary of the Tribunal that the person wishes to proceed with the appeal or claim."

40. It can be seen that a regulation 15(5) notice is only permitted where both the Secretary and the President are of the opinion that "the person making the appeal…is asking the Tribunal to consider a matter which is outside its powers" (regulation 15(5)). In other cases, regulation 15 confers no discretion on the Secretary to refuse to register an appeal.

41. If the general scheme of the Regulations is borne in mind, it is not surprising that regulation 15 provides very limited grounds for refusing to register an appeal. The legislator (the Welsh Ministers) decided to confer registration functions on the Secretary of the Tribunal who is clearly not a judicial office-holder. One would not expect to find responsibilities of a judicial nature conferred directly on a tribunal official, especially in relation to a matter as important as the gateway to a tribunal.

42. Regulation 17 applies to an appeal application that does not include a statement of reasons or reasons which the President considers insufficient to enable the local authority to respond to the appeal. Regulation 17(1) requires the President to direct the appellant to send details of the reasons to the Secretary within 10 working days of the application. Reasons sent in response are to be treated as part of the appeal application (regulation 17(3)).

43. Regulation 17 supports the above interpretation of the registration provisions of the rules. The Secretary's registration duties in regulation 15 are not made subject to regulation 17. The only case in which regulation 15 authorises non-registration is where the Tribunal is asked to do something outside its powers. The Regulations therefore anticipate that an application that is very defective, as it would be if it contained no reasons, would nevertheless be registered under regulation 15. The legislator (the Welsh Ministers) was entitled to enact a scheme like this. The Regulations disclose that the legislator made a choice. It was considered preferable for a defective appeal application (one which fails to comply with regulation 13) to be dealt with by the Tribunal as a judicial case management issue, rather than by barring the door to the Tribunal. This is a perfectly rational approach. One should remember that the relevant rights of appeal were created for the benefit of parents of children with special educational needs, i.e. parents who often face pressures of a far greater magnitude than those faced by parents of children without special educational needs.

44. The fact that regulation 29 confers power to strike out an appeal that is not made in accordance with the Regulations provides further support for the above interpretation. If the Secretary's registration obligation did not extend to appeal applications that were defective for failing to comply with regulation 13, why was this power considered necessary? On the approach taken by the President in this case, there would be no need for this strike out ground because 'appeals' not made in accordance with the Regulations would not be appeals at all.

45. It is true that regulation 12(5) prevents the Tribunal from considering an appeal application "unless proceedings are commenced in accordance with regulation 12(1)". Reading regulations 12(1) and 12(5) together creates a potentially confusing double reference to "in accordance", since regulation 12(1) itself requires an appeal to be made in accordance with the Regulations, but the intention is clear. The Tribunal is not to consider an appeal application unless made in accordance with the Regulations. However, registration of an appeal application is not a function conferred on the Tribunal by the Regulations. Registration is the Secretary's responsibility. Furthermore, the Secretary has no function that involves him or her "considering" an appeal. This is a judicial-type function exercisable only by the President or a tribunal panel.

46. In my view, regulation 12(5) does not require the Tribunal automatically to exercise its case management powers with a view to striking out an appeal application made not in accordance with the Regulations. Take, for example, an appeal application that names the local authority but does not specify its address or an appellant who forgets to sign the application. The appeal application would not have been made in accordance with the Regulations. Would regulation 12(5) mean that, whatever the underlying merits, the

Appellant is to be denied access to justice? The answer is no. Regulation 12(5) is to be interpreted in such a way as to seek to give effect to the Regulations' overriding objective (regulation 6(3)(b)). In my view, this interpretative obligation probably calls for the reference to "considering an application" in regulation 12(5) to be read as a reference to determining an application. It certainly does not require or authorise mass striking out of appeal applications that do not comply with regulation 13.

47. In the light of regulation 29 and other case management powers conferred by the Regulations, the above interpretation of the registration provisions does not raise the prospect of the Tribunal becoming bogged down trying to make sense of defective appeal applications. Regulation 29, for example, confers powers on the President or a tribunal panel to strike out an appeal on various grounds, including that the appeal is made otherwise than in accordance with the Regulations, discloses no reasonable grounds or is an abuse of the Tribunal's process. Due process safeguards apply though. The appellant must be given advance notice of a proposed strike out and has the right to make oral or written representations (regulation 29(1) and (3)). In my view, regulation 29(6) contains a necessary implication that, where oral representations are duly requested, a hearing must be held:

> "(6) An order under paragraph (5) [striking out the whole or part of an appeal] may be made without holding a hearing unless the appellant or the claimant requests the opportunity to make oral representations."

48. I shall briefly mention regulation 36. It deals with the case of a party who fails to comply with a Tribunal direction. However, it confers no power to strike out an appeal. Instead, the sanction is the President's, or a tribunal panel's, power to dismiss an appeal without holding a hearing. Clearly the Tribunal cannot dismiss an appeal unless it is an appeal. And if an appeal is dismissed, there must be a determination of the appeal. Mr S's appeal was not determined. I therefore reject the local authority's argument that the President made a lawful decision under regulation 36.

Why the President's decision involved an error on a point of law

49. The President ordered that Mr S's appeal "shall not be registered". The President had no power to make such an order.

50. The first point is that, under the Regulations, the function of registering an appeal application is conferred directly on the Secretary of the Tribunal and not on the President. The Regulations permit other authorised staff to exercise functions of the

Secretary but do not provide for the Secretary's functions to be exercised by the President.

51. The result is the same even if I assume the President could legitimately either exercise the Secretary's registration functions or control the Secretary's exercise of those function. Note, this should not be read as a finding that the President has such powers. In fact regulation 15(5) tends to suggest otherwise. Regulation 15(5), which authorises non-registration of certain appeal applications, expressly requires both the President and the Secretary to be of the opinion that the Tribunal is being asked to consider a matter outside its matters before a non-registration notice may be given. If the President is in control, the Secretary will not exercise the independent judgement required by regulation 15(5).

52. Even on the assumption just described, the President's order would still lack lawful authority. The duty to register in regulation 15 is only avoided where the Appellant asks the Tribunal to consider a matter outside its powers. There is no suggestion that Mr S was asking the Tribunal to consider a matter outside its powers. So regulation 15(5) could not have authorised the President's order that Mr S's appeal was not to be registered.

53. Nor could regulation 29 (strike out) have authorised the order made by the President. If the appeal had not been registered, there was nothing to strike out. But, even if there was, Mr S had not been afforded the opportunity to make written or oral representations as required by regulation 29(4).

54. I therefore allow Mr S's appeal. The President's order that his appeal 'shall not be registered' was of no effect. If, despite that, it is necessary for me formally to set the President's order aside, I do so.

Jurisdiction

55. At one stage, I thought the President's evident concern about these proceedings might be related to jurisdictional matters and the fact that the primary legislation confers a right of appeal against a decision of the Tribunal, rather than a decision taken by the President. As has been explained, the Regulations confer a number of functions on the President directly. But the written submission supplied on the President's behalf raises no coherent jurisdictional issue.

56. I should, however, briefly address my jurisdiction. The present proceedings challenge a decision taken by the President of the Tribunal, rather than the Tribunal itself. I note that this would not arise under the tribunal system created under the Tribunals, Courts

and Enforcement Act 2007 since that system confers functions on the "First-tier Tribunal" at large.

57. The right of appeal to the Upper Tribunal is conferred by section 336ZB of the Education Act 1996:

> "(1) A party to any proceedings under this Part before the Tribunal may appeal to the Upper Tribunal on any point of law arising from a decision made by the Tribunal in those proceedings."

58. Does this mean there is no right of appeal to the Upper Tribunal against a decision taken by the President when acting as such? It does not.

59. I note it would make for a very inconvenient system if decisions taken by the 'Tribunal' were subject to a right of appeal but decisions of the President were not. I also take into account that, in general and subject of course to any contrary legislative intention, an interpretation that identifies a right of appeal has always tended to be preferred to one that does not. As long ago as the seventeenth century, the House of Lords said:

> "LAW FAVOURS APPEALS &C
>
> …The Wisdom of our Law hath been such, as very rarely to trust any of the Courts of Justice with the final Determination of Matters of Law in the first instance." (*Phillips v Bury*, 1694 [15 Lds. Jo. 441])

60. The Regulations are made by the Welsh Ministers in the exercise of powers conferred by section 336 of the Education Act 1996. Section 336(1) confers a general power upon the Welsh Ministers to "make provision about the proceedings of the Tribunal on an appeal under this Part and the initiation of such an appeal". Section 336(2) then identifies certain matters to which the section 336(1) power extends:

> "(2) The regulations may, in particular, include provision –
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> (c) for enabling any functions which relate to matters preliminary or incidental to an appeal to be performed by the President, or by the chairman."

61. So the regulations may enable functions to be performed by the President. The provision does not refer to functions being conferred on the President. This suggests that the functions themselves have a separate existence and the Regulations may 'enable' their performance by the President. Whose functions are they then? They must of course

be functions of the Tribunal given the general or 'head' power in section 336(1). Exercise of judicial functions by the President involves the exercise of functions of the Tribunal and of course decisions taken by the Tribunal fall within the right of appeal created by section 336ZB. I am satisfied that judicial decisions of the President are decisions of the Tribunal for the purposes of section 336ZB.

What happens next?

62. This matters now goes back to the Special Educational Needs Tribunal for Wales. I doubt I have power to order the Secretary of the Tribunal to register Mr S's appeal application. I do not pursue that possibility because it would call for a further round of submissions. But I hope this decision makes it clear what I think the Secretary should do in order to discharge the duties imposed by regulation 15. I very much hope Mr S does not have to try and enforce the Secretary's regulation 15 registration duties in judicial reviews proceedings before the High Court.

The Special Educational Needs Tribunal for Wales' involvement in these appeal proceedings

63. I now come to what I consider to be an unfortunate aspect of this case, which is the Tribunal's / the President's attempts to become involved in these proceedings before the Upper Tribunal.

Background

64. On 1 December 2017, Mr S was granted permission to appeal to the Upper Tribunal against the President's decision. On 21 December 2017, the Upper Tribunal received an email from the Secretary to the Tribunal:

> "The Tribunal President would wish for an opportunity to provide a response to the appeal and I note that we have not been afforded such an opportunity".

65. An Upper Tribunal staff member informs me that, on 12 January 2018, an official of the Tribunal telephoned her and asserted that the email of 21 December 2017 was a request for the Tribunal to be made a party to the appeal. A record of the call was included in subsequent case managements and its accuracy was not disputed by the Tribunal.

66. On 16 January 2018, the Upper Tribunal received an email from a Tribunal 'case manager':

> "we have now seen the decision of [the] Upper Tribunal [granting Mr S permission to appeal] and this only reinforces our concern that this decision has been made

> without the benefit of the relevant correspondence from Mr [S]. This decision has not been made against the local authority, but against a decision of the President, as the potential appeal was not registered. Consequently the parties involved are the Mr [S] [*sic*] and the Tribunal. Therefore the Tribunal should be allowed to make representations and provide relevant information relating to this matter. At the present time, the Upper Tribunal only have the representations of one of the parties.
>
> …Could you please specifically draw this to the Upper Tribunal Judge's attention, in order that a response is received in good time to allow the Tribunal sufficient time to make its case."

My concerns about SENTW's / the President's attempts to become involved in these proceedings

67. The events just described give rise to a number of concerns:

(a) it was assumed, without explaining why, that the President could seek to provide a response to an appeal brought by a parent against her decision (email of 21 December 2017);

(b) the President must have decided that she wanted to become involved in Mr S's appeal to the Upper Tribunal before she saw the Upper Tribunal's reasons for granting him permission to appeal. This is shown by the wording of the 16 January 2018 email: "we have now seen the decision of the Upper Tribunal and this only reinforces our concern…";

(c) the 16 January 2018 email expressed concern that the Upper Tribunal's decision to grant Mr S permission to appeal was made without it having seen relevant correspondence. The Tribunal must have had this 'correspondence' to know that it was relevant. The Upper Tribunal needs to rely on the Tribunal, as it relies on any tribunal falling within its jurisdiction, to supply it will the relevant appeal file. If any correspondence was omitted, this was the fault of the Tribunal. I should add that this missing correspondence was not subsequently identified;

(d) the legal basis for the Tribunal's / President's attempts to become involved in these proceedings kept changing. To begin with, a request was made to supply a 'response'. Then it was said that that request was actually a request to be made a party. Finally, the 16 January 2018 email asserted that the Tribunal was already a party and wanted to "make its case".

68. Much of this speaks for itself. But I should at least explain why the Tribunal was clearly not a party to Mr S's appeal. This fact would have become obvious if someone at

the Tribunal had taken the trouble to consult the Upper Tribunal's rules (the Tribunal Procedure (Upper Tribunal) Rules 2008). Rule 1(3) defines a "party" as "a person who is an appellant [or] a respondent", and a "respondent" as "in an appeal…against a decision of another tribunal, any person other than the appellant who (i) was a party before that other tribunal". Clearly, the President was not a party to proceedings over which she adjudicated.

69. The Upper Tribunal receives very few applications for permission to appeal against decision of the Special Educational Needs Tribunal for Wales (in fact the only other appeal in the last 4 years was that previously brought by Mr S). But this is no excuse at all for failing to check the Upper Tribunal Rules before making an assertion as radical as that in the email of 16 January 2018. Why should the Tribunal impose lower standards on itself than I am sure it imposes on parties that appear before it?

70. In my view, the President's / Tribunal's attempts to become involved in Mr S's appeal were entirely misconceived (a term that I use advisedly). The actions of December 2017 and January 2018 fell far short of the neutral and dispassionate stance that has, for many years, been viewed as appropriate in those cases where a tribunal is or wishes to become involved in some way in a challenge to one of its decisions (see *S v Special Educational Needs Tribunal and the City of Westminster* [1996] ELR 102).

The Upper Tribunal's directions of 18 January 2018

71. In response to the events described above, on 18 January 2018 I gave case management directions. At the same time, I determined that neither the Tribunal nor the President were a party to the appeal.

72. The directions notice drew attention to:

(a) rule 9(1) of the Upper Tribunal Rules, which confers power on the Upper Tribunal, by direction, to make a person an interested party to proceedings;

(b) rule 5(3)(d), which confers power on the Upper Tribunal to permit or require a "party or other person to provide documents, information, evidence or submissions to the Upper Tribunal".

73. The directions given read:

> "(1) if SENTW (or the President) wish to be made an interested party in these proceedings, the Upper Tribunal must receive a written request within **two weeks** of the date on which these directions are issued.
>
> (2) Any such request must include reasons. The reasons must:

(a) Explain why it is considered necessary for the requester to be made an interested party rather than, alternatively, seek permission as a non-party to supply the Upper Tribunal with written submissions;

(b) If the reasons relate to un-disclosed correspondence, explain why the correspondence was not previously supplied to the Upper Tribunal and why its supply calls for SENTW (or the President) to be made an interested party;

(c) Explain whether the request is made because "issues of general principle as to jurisdiction and procedure are raised, and the tribunal has relevant material to put before the court" (see *S v Special Educational Needs Tribunal and the City of Westminster* [1996] ELR 102). If not, the reasons must explain why, despite the guidance [in *S*], the requester seeks to be made an interested party."

The Tribunal's submissions

74. The Upper Tribunal received a written submission, dated 30 January 2018, signed by the President but described as made on behalf of the Tribunal. It sought permission to make written submissions in the present proceedings, I arranged for Upper Tribunal staff to contact the Tribunal in order to clarify whether their application, if granted, was also intended to stand as their submissions. The Tribunal informed the Upper Tribunal that it was. The application / submissions were supplied to the parties. The local authority did not wish to comment. Mr S disagreed with the content of the submissions but I need not go into the details.

75. The Tribunal's / President's application / proposed submission argues:

(a) Mr S's appeal raises "issues of general importance as to jurisdiction, public policy and procedure";

(b) the SENTW Regulations clearly set out the information that must be provided before an appeal is "lodged" and "no Appeal / Claim exists before this information is completed";

(c) the Regulations "relating to an ongoing Appeal cannot be used to regulate an appeal application which cannot be registered because, despite requests for the necessary information, the necessary information was not provided";

(d) Mr S's appeal application failed to comply with the following regulations:

- reg. 13(1)(a): "name and address of the person making the appeal";

- reg. 13(1)(f): "an address and if available, an email address, where notices and documents for the person making the appeal should be sent". SENTW state "an address was provided but we were unable to use this address due to a complaint from the occupant";

- reg. 13(1)(j): "the result sought";

- reg. 13(2)(b): name and address of school sought to be named in statement. SENTW state "part 4 of the pending Appeal was withdrawn";

- reg. 13(4)(a): written confirmation that any person with parental responsibility for the child has been given notice of the appeal application;

(e) "Regulation 17(1) not provided" (this is not a typo, that is all that was said);

(f) The remedy was in Mr S's hands. He simply needed to provide the information required under the Regulations. He was given that opportunity but did not take it and "in such circumstances, the Tribunal cannot proceed to register the Appeal";

(g) "The Tribunal is concerned that the Upper Tribunal seem to be extending the Regulations to include matter [*sic*] before any Appeal is registered and does not believe the Regulations were ever intended to be used in this way";

(h) SENTW did not in Mr S's case exercise any power under regulation 29. It could not do so since the appeal had not been registered;

(i) The Tribunal is "a small Tribunal" and, as such, it would not be in the public interest "for it to spend valuable resources dealing with matters that are already being dealt with, or are in the process of being dealt with by the Tribunal";

(j) It would be "bad practice" to register an appeal and they stay the matter awaiting the decision of the first Appeal and "the Tribunal avers it is not in the public interest that its resources should be used in this way and there is no prejudice to Mr [S]". The correct course of action, if appeal 1 did not go in Mr S's favour, would be for him to appeal to the Upper Tribunal;

(k) the Upper Tribunal "believes that the current statement is different from the one being appealed". However, the most recent statement is the same as that challenged in appeal 1 so that all matters in dispute are capable of being dealt with in the appeal 1 proceedings.

Evaluation of the Tribunal's submissions

76. I first need to decide whether to permit the Tribunal, as a non-party, to make written submissions in this appeal. I grant permission.

77. I have never before had to deal with a tribunal's application to make submissions on an appeal against one of their decisions. I have spoken to a number of fellow Upper Tribunal Judges. None of them can remember having done so either. I have no doubt why. Most tribunals are well aware that it is very rarely appropriate for them to become involved in appeals against their own decisions. It puts their reputation for impartiality at risk. Special circumstances may justify some degree of involvement, such as the cases identified in *S v Special Educational Needs Tribunal and the City of Westminster* [1996] ELR 102, but never for the purposes of trying to show that the tribunal made the right decision.

78. It is by now probably clear that I do not permit the Tribunal to make written submissions in these proceedings because I think it is appropriate for them to do so. I do not hold that view. The principal reason why I give permission is so that I can explain why the Tribunal's application should not have been made.

79. The Tribunal's written submissions are not drafted in the style of an *amicus curiae*. They are not an attempt to help the Upper Tribunal to understand something of relevance about how the Tribunal operates. They dogmatically advance a particular standpoint and there is nothing balanced about them. It is quite wrong for a tribunal to take this stance. A tribunal is not a party to an appeal to the Upper Tribunal and should not behave as if it is. I would have thought it was obvious that, if a tribunal is to make written submissions on an appeal, it needs to do so in a way which assists the administration of justice. The Tribunal's submissions have not helped me at all. The only thing achieved has been delay.

80. Turning now to the substance of the submissions. There is no discernible chain of reasoning to support the Tribunal's assertions. For example, the Tribunal asserts an appeal does not 'exist' until the information specified in the Regulations "is completed". But why not? 'Because I say so' seems to be the sum total of the reasoning in support of the assertions made.

81. I do not want to spend too much time on further criticisms of the Tribunal's submission but I do need to make the following points:

(a) I have no idea what the statement "regulation 17(1) not provided" is supposed to mean;

(b) As for the 'small tribunal' point, is the Tribunal really so small that it cannot realistically be expected to stay an appeal (i.e. put it in abeyance for a period)? Cases before the Upper Tribunal are often stayed and all it involves is making a short direction, putting a file in a cupboard and making a diary note;

(c) It is said that staying Mr S's appeal would be "bad practice" and not in the "public interest" because it would drain resources. The first point to make is that no one has said the Tribunal has to exercise its power to stay an appeal. It was identified in my grant of permission to appeal as an action that the President arguably should have considered. The second point is, as before, the absence of any reasoning to support the assertions made. What is about a stay that would be 'bad practice'? And the argument that a stay would waste public resources makes no sense. If the Tribunal is seized of an appeal, it has got to deal with it one way or another. And it is not legitimate to rely on 'public resources', especially the minimal resources associated with staying an appeal, when interpreting legislation about a matter as important as access to justice for parents of children with special educational needs;

(d) the submission asserts that the Upper Tribunal mistakenly "believes that the current statement is different from the one being appealed". Whoever wrote this has not read my determination granting Mr S permission to appeal. I did not express any belief that the statements differed. I said "I do not know if the most recent statement exactly reflects the statement challenged in appeal 1";

(e) the local authority made no submission on the question whether the child's statements differed. The Tribunal's attempt to advance an argument on such a specific point cannot possibly be described as an argument on "issues of general importance as to jurisdiction, public policy and procedure".

82. To conclude, the Tribunal's submission provided me with no assistance at all in deciding this appeal. Their application to make written submissions in the proceedings on Mr S's appeal should not have been made.

(Signed on the Original)

E Mitchell

Judge of the Upper Tribunal

2 May 2018