Upper Tribunal for Scotland

2025UT21
Ref: UTS/AP/25/0018

**DECISION OF**

Lady Poole

**IN THE APPEAL**

in the case of

A Scottish Council

Appellant

- and -

LM

Respondent

FTS Case Reference: FTS/HEC/AR/23/0203

Representation
Appellant: Paul Reid KC; Harper Macleod LLP
Respondent: Mike Dailly, Solicitor Advocate; Govan Law Centre

31 March 2025

**DECISION**

The Upper Tribunal for Scotland ("**UTS**") allows the appeal. The decision of the First-tier Tribunal of Scotland ("**FTS**") dated 20 January 2025 was made in error of law. It is quashed and re-made as follows:

> "The reference to the FTS is dismissed. The FTS has no jurisdiction to determine the reference under section 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004. The placing request was not within paragraph 2 of schedule 2 of that Act, because the requested school was not a special school within the statutory definition in section 29(1) of that Act".

**REASONS FOR DECISION**

**Summary**

1. This is a case about a school placing request made by the mother of a child CM ("**LM**"). Where a child or young person has additional support needs, an education authority may have a duty to comply with a placing request in respect of that person. If such a duty arises, the education authority must place the person in the requested school, and meet the expense of attendance there. However, the duty can only arise in relation to requested schools within definitions set out in governing legislation. One category in the legislation relied on in this case is a special school.

2. This case finds that, when the statutory definition of special school is properly interpreted and applied, the requested school was not within that definition. No duty could therefore arise to place CM there under the provisions relied on in this case. A consequence of that finding is that the FTS did not have jurisdiction to determine the reference made to it, and should have dismissed it. That is because the governing legislation did not give the FTS jurisdiction unless the placing request was in relation to a special school.

3. Before making its decision in this case, the UTS read the views of CM about the placing request provided to the FTS, both in the FTS bundle and as summarised in the FTS decision. It was helpful knowing those views. However, it is primarily for the law makers to specify which types of schools can be covered by a placing request. The function of the FTS and UTS is to apply the provisions of the law as enacted, even though it is acknowledged that the outcome of this appeal is not the one CM and LM would prefer. CM and LM may wish to consider further what is set out in paragraph 17 below.

**Background and procedural history**

4. CM has a diagnosis of ADHD and autism, and has additional support needs. The appellant education authority (the "**Council**") had given CM a place in a mainstream school. CM experienced difficulties there, so LM moved CM to a small independent school ("**school B**") for the start of the new academic year in 2023. LM made a request to the Council formally to place CM at school B. The Council refused the placing request on 1 November 2023.

5. LM referred the Council's decision to the FTS on 19 December 2023. In a decision dated 20 January 2025, the FTS found it had jurisdiction by majority, overturned the decision of the Council, and required the Council to place CM in school B immediately. The Council then appealed to the UTS on a point of law, and permission to appeal was granted by the FTS.

The UTS granted an application of the Council to suspend the decision of the FTS pending determination of the appeal, after the Council gave an undertaking that, if unsuccessful in the appeal, it would meet the expenses of school B from the date of the FTS decision. Because the appeal was about the education of a young person, and given the time that had already elapsed since the placing request was made, procedure in the UTS was accelerated by agreement. Parties provided written submissions and authorities, and an oral hearing of the appeal was heard on 28 March 2025.

**The ground of appeal and parties' submissions**

6. The ground of appeal before the UTS, following additional permission granted by the UTS, was:

> "Did the tribunal err in its interpretation and application of the term "special school", as it is defined in section 29(1) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the "**2004 Act**")?"

7. At the oral hearing before the UTS, the parties were in agreement that the FTS had erred in its approach to statutory interpretation. The FTS had approached the task of statutory construction in the wrong way, by breaking down the definition of special school into multiple constituent parts, rather than following the approaches to statutory construction suggested in the authorities. The question for determination in this appeal then came to be what the correct interpretation and application of the statutory provisions were. Parties helpfully provided a short summary of their respective positions, from which the next two paragraphs are adapted. The UTS also took into account everything in the written and oral submissions before it.

8. The Council argued that, applying the ordinary rules of statutory interpretation (*R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at paragraph 8), for a school to be a "special school" within the meaning of the 2004 Act, it

> (a) has to have as its main purpose the provision of education specifically suited to the additional needs of its pupils ("the purpose test"); and
>
> (b) has to select its pupils for attendance by reason of their additional needs ("the selection test").

The Council argued that the majority in the FTS erred in finding that the purpose test was met in respect of school B, and the minority member was correct it was not. The FTS also erred in finding that the selection test was met; on the contrary, on the evidence accepted by the FTS, school B did not select its pupils by reason of their additional needs.

9. LM on the other hand argued that the finding of the FTS that school B was a special school was correct. Section 29(1) should be interpreted in relation to its ordinary use of language and in the wider context of the definitions in section 1 and the 2004 Act generally (*R222 for Judicial Review (Appellant) (Northern Ireland)* [2024] UKSC 35 at paragraph 74), and also

having regard to the 2004 Act's Explanatory Notes and the relevant statutory guidance. LM further argued that the FTS had sufficient evidence before it to make findings-in-fact that school B's "main purpose" was to provide "education specially suited to the additional support needs of ... young persons" and that CM had been "selected for attendance" at school B "by reason of those needs". It was submitted that the case turned on its own unique facts and circumstances and did not give rise to any wider public policy implications. The UTS was invited to refuse the appeal and reinstate the FTS's decision of 20 January 2025.

10. The UTS accepts that the approach of the FTS was in error of law. The FTS should have approached the task of statutory construction by seeking to ascertain the meaning of the words used by Parliament in the light of their context, and the purpose of the statutory provision (*JR222 for Judicial Review (Appellant) (Northern Ireland)* [2024] UKSC 35 at paragraph 73). The FTS ought to have sought to give effect to Parliament's purpose, read the whole provision in the context of the statute as a whole, and the statute in the historical context of the situation which led to its enactment (*R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at paragraph 8). They should have endeavoured to give the definition of special school its natural and ordinary meaning (*Barratt Scotland Ltd v Keith* 1993 SLT 142 at 157E). The task for the UTS was therefore to apply that approach to the interpretation and application of section 29(1) of the 2004 Act.

**Governing law**

*Relevant provisions in the 2004 Act*

11. Placing requests in respect of children and young people with additional support needs are primarily governed by the 2004 Act, and in particular schedule 2 which is given effect by section 22. Paragraph 2 of schedule 2 sets out the types of schools where a duty may arise to place a child or young person after a placing request. There are various types of schools listed, such as public schools under the management of an education authority, and certain other schools not relevant in this case. Because school B is not under an education authority's management, LM relies on a particular part of paragraph 2(2) of schedule 2. This makes provision for placing requests to a school

> "not being a public school but being…a special school the managers of which are willing to admit the child…".

The Explanatory Notes to the 2004 Act explain at paragraph 72 that placing requests can be for a special school (public or independent) or a mainstream school. If the specified school is an independent special school, in Scotland or elsewhere in the United Kingdom, the education authority must meet the fees and other costs.

12. The definition of special school given in section 29 of the 2004 Act is:

> ""special school" means –
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> (a) a school, or
>
> (b) any class or other unit forming part of a public school which is not itself a special school,
>
> the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs".

The Explanatory Notes to the 2004 Act explain that the section provides a new definition of special school, referring to provision suited to the additional support needs of children and young persons, rather than recorded children as in the previous definition.

13. Even where a placing request is made to a school of one of the types that is specified, it can still be refused if statutory grounds are established. These are set out in paragraph 3 of schedule 2 to the 2004 Act. It is not in dispute in this case that no grounds of refusal existed, and so if school B is a special school, the placing request falls to be granted.

14. Section 18(3)(da) of the 2004 Act permits references to the FTS if an education authority has made a decision refusing a placing request, among other things, to place a child in a special school.

15. Section 1(1) of the 2004 Act defines additional support needs as:

> "A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person".

Additional support, under section 1(3), means:

> "(a) in relation to an eligible pre-school child, a child of school age or a young person receiving school education, provision (whether or not educational provision) which is additional to, or otherwise different from, the educational provision made generally for children or, as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority responsible for the school education of the child or young person, or in the case where there is no such authority, the education authority,
>
> (b) in relation to a child under school age other than an eligible pre-school child, such provision (whether or not educational provision) as is appropriate in the circumstances."

*Other legislative context*

16. Section 15 of the Standards in Scotland's Schools etc. Act 2000 (the "**2000 Act**") provides:

> "(1) Where an education authority, in carrying out their duty to provide school education to a child of school age, provide that education in a school, they shall unless one of the circumstances mentioned in subsection (3) below arises in relation to the child provide it in a school other than a special school. …
> (3) The circumstances are that to provide education for the child in a school other than a special school —
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> (a) would not be suited to the ability or aptitude of the child;
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> (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or
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> (c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,
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> and it shall be presumed that those circumstances arise only exceptionally".

This is commonly known as the presumption in favour of mainstream education. The presumption is given further effect in the 2004 Act by being a reason a duty to place a child in a requested school may not arise; schedule 2, paragraphgraph 3(1)(g).

17. A placing request under the 2004 Act is not the only way in which a request for a pupil to be educated in a particular school may be met by an education authority. Leaving aside the placing provisions in respect of pupils without additional support needs in the Education (Scotland) Act 1980 (the "**1980 Act**"), there are further provisions in section 49 and 50 of the 1980 Act. Section 49 confers powers on education authorities to assist pupils to take advantage of educational facilities. Section 50 gives powers to education authorities, among other things, to make arrangements to enable a pupil to attend an appropriate school where

> "school education suitable to the age, ability and aptitude of any pupil can … best be provided for [them] at any particular school".

These are discretionary powers, but they can be used by education authorities in appropriate cases to make available educational facilities and schools, even where no duty to do so arises under the 2004 Act.

**Statutory construction of the definition of special school**

18. The starting point is the wider legislative context, before going to the terms of the definition of special school in section 29(1) of the 2004 Act. There is a presumption in favour of mainstream education (section 15 of the 2000 Act, given further effect in schedule 2 paragraph 3(1)(g) of the 2004 Act). Parties agreed this was a deliberate policy choice to further inclusion. This suggests that the majority approach in the FTS to the

statutory definition of special school, of treating it as "vague… purposely so to allow the justiciary maximum discretion given the matter is dealt with in an expert jurisdiction", cannot be correct. The context instead points towards an interpretation which respects statutory wording, rather than one which seeks to increase education outside mainstream education by taking an expansive approach to "special school" unsupported by the words of the statute or facts found. Also evident from the wider legislative context is that the 2004 Act is not the only statutory route under which an education authority may make available education in a particular school if it is best provided there. In particular, section 50 of the 1980 Act may be apposite where the characteristics of a pupil may suggest school education in a particular school. Those powers are discretionary, and their exercise is not a matter over which the FTS has jurisdiction. But their existence suggests the overall legislative scheme is not one where it is appropriate to strain the definition of special school in the 2004 Act (and its application) in order to achieve a result that might be available under other powers the legislature has provided.

19. The 2004 Act, in which the definition of special school is found, has an overall purpose of making provision for people with additional support needs in connection with school education. It sets out provisions which are not of general application to all children, but focus on those with additional support needs. LM's submission that the definition in section 1 of the 2004 Act of additional support needs is wide is accepted. It is also accepted that a wide range of factors may lead to some children and young people having a need for additional support, and support can be provided in a number of ways and locations. The definitions in section 1 of the 2004 Act are wide enough that over 1/3 of children in school A, and over 1/2 of pupils in secondary schools in the Council's area, are recorded as having additional support needs. But it does not follow from these wide definitions that the FTS should also take an expansive approach to the interpretation and application of a special school. Given that so many children are recorded as having additional support needs, it has to be recognised that additional support needs can be and often are met within mainstream education. The 2004 Act imposes obligations on education authorities which must be met from public funds in respect of pupils with additional support needs, and so it is appropriate to observe not only the existence of those obligations but also their limits. The 2004 Act does not give rise to obligations in respect of all school pupils, and its provisions apply only to pupils with additional support needs. One particular limit Parliament chose to impose was the type of schools to which placing requests may be made under schedule 2. Parliament could have chosen to include independent schools as a general category, but did not. Instead, the only independent schools which are covered in paragraph 2 of schedule 2 are those which also fall into the listed categories, such as being a special school. The context is one in which Parliament chose to be selective.

20. Turning to the wording of the definition of special school in section 29(1) of the 2004 Act, the task of the FTS was to give effect to the natural and ordinary meaning of its words,

construed in their context. The definition of special school on its wording catches some classes and units within public schools. This case is not concerned with that aspect of the definition, but just the part that refers to "a school". (This is because the wording of paragraph 2(2) of schedule 2 being relied on for the placing request in this case includes the words "not being a public school"). So the FTS had to consider if school B was a school "the sole or main purpose of which is to provide education specially suited to the additional support needs of children and young persons selected for attendance at the school…by reason of those needs".

21. The Council submitted that on the plain wording of the definition of special school in section 29(1) of the 2004, it contains a "purpose" test and a "selection" test. It is accepted that it is helpful to analyse the provision in that way, although the two "tests" are interlinked and cannot be completely separated because of the way the definition is worded. The "purpose" test is that the sole or main purpose of the school has to be to provide education specially suited to additional support needs. And, reading the full definition, it is not just any additional support needs, but the particular type of additional support needs of children selected to attend it. That is because the words at the end of the definition "by reason of those needs". This links back to the type of additional support needs it is the purpose of the school to provide education specially suited to. The "selection" test is that pupils have to be selected for attendance at that school by reason of those needs – being the additional support needs the purpose of the school is to provide education specially suited to.

22. The suggestion on behalf of LM that there cannot be a "selection" test, but instead should be a "reason" test, is rejected. The submission was that, in addition to a purpose test, a reason test should be applied, of whether the reason for attendance was because of a pupil's additional support needs. Consideration was given to the extracts from the *Additional support for learning: statutory guidance 2017* provided by LM, but ultimately it was for the UTS to give effect to the wording Parliament chose to use. The problem with LM's submission is that it fails to give effect the word "selected" which the legislature chose to use. The word "reason" is within the section 29 definition of special school, but it is part of the selection test, because the wording is "selected…by reason of those needs". Despite the submissions on behalf of LM, there is no absurdity in finding that selection refers to the decision of the school to offer a place to the child by reason of their additional support needs. This fits in with the wording of paragraph 2(2)(a) of schedule 2 to the 2004 Act, which qualifies eligible special schools by the words "the managers of which are willing to admit the child". It also fits with the finding of the FTS that children were selected for attendance at school B (paragraph 94). Finally, as submitted by the Council, although the concept of a special school existed before the 2004 Act was passed, and was the subject of definitions in the 1980 Act, the "selection" wording was a new introduction in the 2004 definition. It must be assumed that Parliament meant the new wording to be given effect. Accordingly, a child may wish to go to a particular school as

it will fit better with their additional support needs, and that is their reason for going. But that is not enough to meet the selection test, if the school does not select them for a place by reason of their additional support needs, which are needs that it is the purpose of the school to provide education specially suited to.

**Application of statutory provision to the facts found by the FTS**

23. The decision of the majority of the FTS that school B was a special school was surprising given two other findings it made. The first was that school B was not on the National Register of Special Schools. The FTS was correct that it is not a statutory requirement for a school to be on that register before falling within the definition of special school in section 29(1) of the 2004 Act. Nevertheless, it is likely to be a strong evidential factor as to whether a school is a special school or not. The second was the evidence of the headteacher of school B that she did not view it as a special school.

24. To decide if school B is a special school, both the "purpose" and the "selection" tests discussed above must be applied. Before doing so, it is worth observing that the "purpose" and "selection" tests are relatively easy to apply in relation to many special schools, because they are frequently set up for a particular type of additional support need. That is one reason why they are special. The FTS mentioned special schools for the blind, autism spectrum disorder, and severe and complex needs. Others might be epilepsy, deafness, or secure schools. It is clear the sole or main purpose of the school is to provide education specially suited to the type of additional support needs it has been set up for, and in respect of which pupils are selected for attendance. By contrast, in this case the FTS experienced evident difficulty in applying the statutory wording to school B so as to find it to be a special school.

25. Looking first at the "purpose" test, the majority of the FTS found that the purpose of school B was to allow those who couldn't access education in a mainstream environment to access the education they were entitled to (paragraph 64). Two points may be made. First, it is unclear what the factual basis for making this finding was. The evidence of the headteacher of school B was that school B was dedicated to supporting young people who had struggled in school environments regardless of what they are (paragraph 67), with no reference to mainstream. Most if not all schools take pupils who have moved from other schools, but that does not make them a special school. Second, the use of the word "special" suggests that the purpose of the school has to be to provide not a general education, but something special or particular which is adapted to the needs of pupils selected by reason of those needs. There is no finding that the sole or main purpose of school B is to provide education specially suited to learners with ADHD and ASD such as CM. It is a smaller school that can provide a tailored education, but it is not tailored just to additional support needs. The basis on which the majority found school B met the purpose test is unpersuasive. The minority on the other hand looked at the evidence of

how the school came into being. First there was a college from the 1980s for pupils of 16 and over, to complete English and other qualifications. The school developed so that from 2012 it came to have a middle school for pupils from S3, often where they had struggled in other environments. A clear finding was made on that evidence that school B's main purpose was to support the learning of all children who required support. But that was the purpose of all schools, so school B's sole or main purpose was not to provide education specially suited to additional support needs. As the Council put it, school B was a smaller school that could provide a tailored education, but it was not tailored just to additional support needs. The minority approach is based on a factual analysis, and appears closer to the intention of section 29(1) of special schools being those offering education specially adapted to additional support needs of pupils selected for them by reason of those types of needs. The minority approach to school B's purpose is to be preferred, and school B did not satisfy the "purpose" test within section 29(1).

26. Even if that is wrong, and school B could be regarded as having a qualifying purpose, there was no basis for the FTS to find that the "selection" test was met. There is no factual finding that pupils at school B were selected for attendance at the school by reason of their additional support needs (the sort of needs the sole or main purpose of school B was to provide education specially suited to). Such a finding would have been contrary to the evidence. It was accepted by the FTS that school B admitted learners without additional support needs, albeit in small numbers (paragraph 69). There was also evidence that if a prospective pupil was looking for a smaller school, they would not be rejected from school B on the basis that they did not have additional support needs (paragraph 91). It was accepted that school B was a school which took children without identified additional support needs. The furthest the majority could go was to find that pupils were selected for attendance (paragraph 94). The minority was correct, on the factual findings made the FTS, to find that pupils were not selected by reason of additional support needs (also paragraph 94). On that basis alone the definition of special school was not met, and the FTS should have found it had no jurisdiction to determine the reference to it.

27. The underlying difficulty with the majority position is that their reasoning process means many schools, including independent schools, could potentially fall within the definition of special school, with duties then arising to place children there unless statutory reasons in paragraph 3 of schedule 2 were made out. But the wider statutory context set out above must be borne in mind; the presumption in favour of mainstream, the clear intention of Parliament to restrict the types of schools to which placing requests can be made under the 2004 Act, and the existence of alternative statutory powers in the 1980 Act which can be exercised as a matter of discretion in appropriate cases. The effect of the majority's reasoning, albeit simplified, is that they note the features of school B which suited CM's additional support needs (small numbers, small classes, reduced timetables, fewer transitions, some online learning so attendance in classroom could be part time, neutral colours and no bells giving sensory benefits, a quiet room, and others). Next they

note the high levels of pupils at the school with additional support needs, and two previous placements of pupils by the Council at school B. Putting these and other factors together, they ultimately find school B to be a special school. The problem with this approach is that there is additional support needs provision at all schools. The minority drew on education expertise stating that mainstream schools regularly make sensory adjustments, adjustments to transitions, provide dedicated quiet spaces, and adapt teacher and support staff to pupil ratio to provide support. The minority member observed that all that was being provided in school B could be replicated in mainstream with the exception of the class size, but that of itself was dependent on things such as school location or subject. Further, there are also growing numbers of pupils with additional support needs at schools, with over half of secondary pupils in the Council's area having additional support needs. It does not follow from a school providing significant levels of support for additional support needs, or having small class sizes, or having high numbers of pupils with additional support needs, that a school is a special school. Those may be features of special schools, but they are not the defining factors, because they can be features of mainstream and independent schools too. Nor can inferences properly be drawn from the Council having previously met fees of two pupils at school B that school B is a special school, given the availability to the Council of other powers under the 1980 Act. To decide whether a school is a special school or not, the statutory definition in section 29(1) of the 2004 Act must be applied. The majority of the FTS failed properly to do that.

**Conclusion**

28. The decision of the majority of the FTS was in error of law, in that it misconstrued and misapplied section 29(1) of the 2004 Act. When that provision is properly interpreted and applied, school B was not a special school within the statutory definition. The FTS had no jurisdiction to determine the reference before it, because it was not within section 18(3)(da) of the 2004 Act. Under section 47 of the Tribunals (Scotland) Act 2014 the decision of the FTS of 20 January 2025 is quashed, and the decision remade in the terms at the start of this decision.

Lady Poole

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*